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No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

LYNDON H. LAROUCHE AND DEMOCRATS FOR ECONOMIC RECOVERY-LAROUCHE IN '92, RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042, permits the Federal Election Commission to determine that a candidate's statutorily required promises are insufficient to establish his eligibility to receive a public subsidy for his campaign, where there is a record of his having repudiated those same promises and submitted false documentation in four previous campaigns and he has been convicted and imprisoned for conspiring to defraud both another federal agency and his own private contributors.

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PETITION FOR A WRIT OF CERTIORARI

The Federal Election Commission ("the Commission" or "FEC") respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Lyndon H. LaRouche and Democrats for Economic Recovery-LaRouche in '92 v. Federal Election Commission*, 996 F.2d 1263 (D.C. Cir. 1993).

OPINION BELOW

The July 2, 1993, decision of a panel of the court of appeals, one judge dissenting in part, reversed the Commission's final determination that Lyndon LaRouche had failed to establish

his eligibility for matching payments for the 1992 election cycle under the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042 ("Matching Payment Act" or "the Act"). The court's opinion is reported at 996 F.2d 1263 (D.C. Cir. 1993), and is reprinted as Appendix A (App. 1a-18a) of the Commission's separately bound volume of appendices. The Commission's statement of legal and factual reasons in support of its determination appears in Appendix B (App. 19a-58a).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 2, 1993. Under the Matching Payment Act, 26 U.S.C. § 9041(a), that court had jurisdiction to review the Commission's final determination. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case concerns provisions of the Presidential Primary Matching Payment Account Act, particularly 26 U.S.C. § 9033, establishing requirements for a candidate's eligibility for matching funds. For the Court's convenience, the Matching Payment Act and key regulations implementing the Act are set forth as Appendix C (App. 60a-74a) and Appendix D (App. 75a-101a) respectively. Relevant provisions of the statute establishing the Commission, the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("the FECA"), are set out in Appendix E (App. 102a-119a).

STATEMENT OF THE CASE

A. The Federal Election Commission

The Commission is the independent federal agency with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Matching Payment Act, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, and the FECA. Congress empowered the Commission to "formulate policy with respect to" all these statutes, 2 U.S.C. § 437c(b)(1), gave it broad authority to administer these laws, *see, e.g.*, 2 U.S.C. §§ 438(a) and (b), 26 U.S.C. §§ 9005, 9007, 9036, and 9038, and authorized it to make "such rules . . . as are necessary to carry out the provisions" of the statutes it administers, 2 U.S.C. §§ 437d(a)(8), 438(a)(8). Specifically, the Commission is "authorized to prescribe rules and regulations . . . and to require the keeping and submission of any books, records, and information, which it determines to be necessary to carry out its responsibilities" under the Matching Payment Act. 26 U.S.C. § 9039(b).

B. The Matching Payment Act

The Matching Payment Act, enacted in 1974, provides limited public funding of presidential primary campaigns by authorizing federal matching payments for certain small contributions to eligible candidates. A presidential primary candidate bears the burden of establishing his or her eligibility for this public funding. *See* 26 U.S.C. §§ 9033, 9036(a); 11 C.F.R. Part 9033. As a threshold matter, a candidate must demonstrate and "certify" that (1) the candidate is seeking nomination by a political party for election to the office of President of the United States, (2) he or she has received matching contributions that, in the aggregate, exceed $5000 from residents of each of at least 20 states and that no individual has contributed more than $250, and (3) the candidate's autho-

rized campaign committees will not incur qualified campaign expenses in excess of the limitations on such expenses under 26 U.S.C. § 9035. *See* 26 U.S.C. § 9033(b).

In addition to this "threshold submission," the candidate must also, *inter alia*, promise in writing that the candidate and his or her presidential campaign committee will fulfill a number of "conditions" to the receipt of public funds. 26 U.S.C. § 9033(a). These conditions include: (1) providing the Commission with any evidence it requests regarding qualified campaign expenses; (2) maintaining and furnishing to the Commission any records or other information it requests; and (3) cooperating in a post-election audit by the Commission, *see* 26 U.S.C. § 9038, and making any repayments required as a result of that audit.

The Commission's regulations provide more detailed requirements for establishing eligibility. *See* 11 C.F.R. §§ 9033-9034.[1] The regulations require that contributions proffered for matching funds reflect the contributor's "necessary donative intent," 11 C.F.R. § 9034.3(i), and specify that the Commission will look beyond the face of a threshold submission if necessary, including conducting "further inquiry" into any

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[1] For example, the candidate must agree that he or she will: (1) keep and furnish to the Commission all documentation for matching fund submissions, including any books, records and supporting documentation and other information that the Commission may request; (2) prepare matching fund submissions in accordance with the Commission's *Guideline for Presentation in Good Order*; (3) comply with the contribution limits and other applicable requirements of the FECA, 2 U.S.C. § 431 *et seq.*, and the Commission's other regulations; and (4) pay any civil penalties included in a conciliation agreement between the Commission and the candidate's campaign committee under 2 U.S.C. § 437g. 11 C.F.R. §§ 9033.1(b)(2), (b)(4), (b)(5), (b)(8), (b)(9), and (b)(10). *See also* 11 C.F.R. §§ 9033.9 and 9033.11; Final Rule on Public Financing of Presidential Primary and General Election Candidates, 56 *Fed. Reg.* 35,896, 35,904 (July 29, 1991).

submission, if it determines "that additional information must be obtained," 11 C.F.R. § 9039.3(a)(1). The regulations also provide that the Commission may consider, in addition to the threshold submission, other information in its possession, including the candidate's past actions in prior publicly-financed campaigns, in evaluating the candidate's eligibility for matching funds. 11 C.F.R. § 9033.4(b).[2] If the Commission finds "patent irregularities suggesting the possibility of fraud in materials submitted by, or in the activities of, the candidate or his or her authorized committee(s)," matching payments may be withheld pending the results of the inquiry. 11 C.F.R. § 9039.3(a)(3).

Upon receipt of the candidate's threshold submission, candidate agreement, and any other necessary information, the Commission makes a determination of eligibility for public matching funds. If the Commission determines that the candidate has established his or her eligibility for public financing under the Act, matching payments are paid directly to the candidate,[3] who is personally responsible for these public funds. *See* 26 U.S.C. §§ 9036-9038. If the Commission concludes that the candidate has not established his or her eligibility, it makes an initial determination of ineligibility and provides the candidate with a statement of legal and factual reasons for the determination. 11 C.F.R. § 9033.10(b). The

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[2] Examples of factors that the Commission may consider include a candidate's repudiation of an earlier candidate agreement, or the appearance of patent irregularities suggesting the possibility of fraud in earlier matching fund submissions that seem to be recurring in the new request for certification. *See Explanation and Justification of Title 26 Regulations*, 52 *Fed. Reg.* 20,864, 20,868-69 (June 3, 1987).

[3] No later than ten days after a candidate establishes his or her eligibility, the Commission "shall certify to the Secretary [of the Treasury] for payment to such candidate . . . payment in full of amounts to which such candidate is entitled." 26 U.S.C. § 9036(a).

candidate is then given an opportunity either to satisfy the requirements the Commission has found lacking or submit a legal and factual statement to demonstrate that he or she has, in fact, met all requirements. 11 C.F.R. § 9033.10(c). If, after this review, the Commission makes a final determination of ineligibility, it provides a statement of legal and factual reasons explaining this determination. *Id.* A candidate may file a petition for rehearing of such a final determination, *see* 11 C.F.R. § 9033.10 (e) and 11 C.F.R. § 9038.5(a), and may seek review of the Commission's determination in the United States Court of Appeals for the District of Columbia Circuit, 26 U.S.C. § 9041(a).

C. LaRouche's History of Fraudulent Campaign Financing Activity

Lyndon H. LaRouche, Jr., has been a presidential candidate in each election since 1976 and has sought federal matching funds under the Matching Payment Act for each campaign. Although he submitted the required candidate agreement in each campaign, each time he either repudiated his promises or engaged in other fraudulent behavior to obtain matching funds.

1. LaRouche's 1976 Campaign

In 1976 Mr. LaRouche certified to the Commission that he had received the requisite number of contributions in 20 states to satisfy the fundraising threshold for public financing, 26 U.S.C. § 9033, but the supporting documentation he submitted contained patent irregularities indicative of fraud. The D.C. Circuit upheld the Commission's rejection of LaRouche's matching fund submission after an investigation revealed that a number of the contributions he had submitted were falsified. *See Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 847-848 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). *See also, Jones v. Unknown Agents of FEC*, 613 F.2d

864, 871, 872-73 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). (App. 29a-30a, 34a-36a.)

2. LaRouche's 1980 Campaign

In 1980, the Commission certified Mr. LaRouche eligible for $526,000 in matching funds. The post-election audit required by 26 U.S.C. § 9038 revealed a host of violations of the Matching Payment Act and the Federal Election Campaign Act. An enforcement investigation, conducted under 2 U.S.C. § 437g, resulted in a negotiated conciliation agreement, 2 U.S.C. § 437g(a)(4), in which Mr. LaRouche's campaign committee explicitly admitted committing 79 violations, including 26 specified instances of "knowingly and willfully submitting false and/or misleading information to the Commission in an attempt to obtain matching funds." *See FEC v. Citizens for LaRouche*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 9214, p. 51,713 (D.D.C. 1984). (App. 36a-37a.)

Mr. LaRouche's committee defaulted on its promise in the conciliation agreement to pay a $15,000 civil penalty, refusing even to respond to the Commission's requests for payment. The Commission then filed suit to enforce the agreement against both the committee and Mr. LaRouche, based upon his promise in his matching fund submission that he would pay any civil penalty incurred either by him or by any of his authorized campaign committees. (App. 37a.) *See FEC v. Citizens for LaRouche*, 2 Fed. Election Camp. Fin. Guide at 51,713. Mr. LaRouche responded by explicitly repudiating this promise, arguing that he had altered the wording required by the regulation so that his promise did not "bind[ ] him to an agreement to which he was not a party," *id.* at 51,716. The court rejected this argument, held that "LaRouche is bound by the terms" of his promise, *id.*, and found him "jointly and severally liable for the civil penalty assessed against [the defendant committee]." *Id.* at 51,716-17.

3. LaRouche's 1984 Campaign

In January 1984, Mr. LaRouche submitted a letter to the Commission in support of his application for matching funds in which he promised, as he had in 1980, to make any repayments the Commission found necessary as the result of a post-election audit and to pay any civil penalties imposed upon him or his authorized campaign committees. At the time he was promising to honor those obligations, he was refusing to make the repayments the Commission had ordered after its audit of his 1980 campaign[4] and was repudiating in court his 1980 promise to pay the civil penalties agreed to by his campaign committee, as discussed above. The Commission issued an initial determination that he had not established his eligibility because his "attempt to induce the Commission to certify him to receive public funds, on the basis of promises which he has demonstrated he has no intention to fulfill, constitutes a fraudulent submission" (App. 38a). Two courts later agreed with this determination. *LaRouche v. State Board of Elections*, 758 F.2d 998, 1000 (4th Cir. 1985); *Spannaus v. FEC*, 641 F.Supp. 1520, 1526 (S.D.N.Y. 1986), *aff'd mem.*, 816 F.2d 670 (2d Cir. 1987).

After Mr. LaRouche and his committee paid the outstanding civil penalty and the balance of his 1980 repayment and sub-

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[4] Mr. LaRouche had appealed the Commission's repayment determination to the D.C. Circuit, but he had not sought a stay of the Commission's order pending appeal. In the absence of a stay, repayments are due within 20 days of the Commission's order, 11 C.F.R. § 9038.5, *see Carter/Mondale Presidential Comm. v. FEC*, 711 F.2d 279, 288, 289 (D.C. Cir. 1983), and LaRouche had agreed to comply with those regulations in his 1980 candidate agreement. Although the D.C. Circuit summarily affirmed the Commission's repayment determination, *Citizens for LaRouche v. FEC*, 725 F.2d 125 (D.C. Cir. 1984), Mr. LaRouche did not repay the sums until several months later, and then only after the Commission made clear that he would not receive matching funds for his 1984 campaign until he did so. (App. 39a-40a.)

mitted an affidavit affirming that he would now accept personal responsibility to fulfill the promises made in his 1984 submission, the Commission agreed to certify him eligible for matching payments. (App. 39a-40a.) However, the post-election audit again turned up evidence of fraudulent fundraising practices, including $35,000 in credit card contributions that were withdrawn from the 1984 campaign's account because the cardholders denied having authorized the contributions. (App. 40a-41a.) The Commission also received complaints directly from individuals who made similar claims that LaRouche's campaign had made unauthorized charges against their credit cards for campaign contributions. *See Spannaus v. FEC*, 641 F.Supp. at 1524-1525. In the ensuing enforcement investigation under 2 U.S.C. § 437g, LaRouche's campaign committee insisted, despite Mr. LaRouche's promise in his matching fund submission that his campaign committee would "keep and furnish to the Commission any records, books, and other information it may request," 26 U.S.C. § 9033(a)(2), that it need not produce its fundraising records because it had engaged Caucus Distributors, Inc., a corporation operated by LaRouche associates, to do its fundraising and thus that those records were not in the campaign committee's possession. (App. 41a.) Even after the bulk of the Commission's subpoena for those documents was judicially enforced, *FEC v. The LaRouche Campaign*, 644 F.Supp. 120 (S.D.N.Y. 1986), *aff'd as modified*, 817 F.2d 233 (2d Cir. 1987), LaRouche's committee continued to refuse to comply. (App. 41a-42a.)

4. LaRouche's 1988 Campaign

When Mr. LaRouche submitted his matching fund request for his 1988 campaign, his record of fraud and refusal to fulfill his promises prompted the General Counsel to recommend that Mr. LaRouche be found not to have established his eligi-

bility for federal funds unless certain special conditions were met. The General Counsel recommended, first, that the candidate and the treasurer of his principal campaign committee be required to submit affidavits containing additional assurances of compliance, and second, that the Commission be given the opportunity to check each contribution in the threshold submission with the purported contributor to confirm that it was actually given as a campaign contribution. (App. 42a-43a.)

Mr. LaRouche's committee asked the Commission to defer consideration of the threshold submission and later entered into an agreement with the Commission that written requests for confirmation would be sent by the Commission to some 1,000 contributors listed in the threshold submission whose checks contained apparent irregularities. In addition, the committee agreed that Mr. LaRouche and his treasurer would submit affidavits accepting personal responsibility for maintaining and delivering campaign records to the Commission. (App. 43a-44a.) Only 713 of the purported contributors responded to the request for confirmation, and 43 of these denied any intention to contribute to Mr. LaRouche's presidential campaign. (App. 44a.)

Despite this evidence of continuing false contribution submissions, the Commission decided not to reject Mr. LaRouche's application for matching funds. Instead, it certified matching payments after Mr. LaRouche submitted the affidavits accepting personal responsibility and additional contributions to satisfy the fundraising threshold. (App. 45a.)

D. LaRouche's Conviction for Fraudulent Fundraising

On December 16, 1988, Mr. LaRouche was convicted by a federal jury in the Eastern District of Virginia on eleven counts of mail fraud, one count of conspiracy to commit mail fraud, and one count of conspiracy to defraud the Internal Revenue

Service, and was sentenced to 15 years in federal prison. The treasurer of his 1984 and 1988 campaign committees and five of his other associates were also convicted on one or more of these counts. (App. 46a.)

Except for the count concerning the IRS, the indictment involved fraudulent fundraising practices engaged in by Mr. LaRouche and his associates. On appeal the Fourth Circuit upheld Mr. LaRouche's convictions on the basis of the evidence that "LaRouche, a candidate for the Democratic Presidential nomination in 1980 and 1984 . . . headed the NCLC [a major LaRouche political fundraising organization]," that "[t]he NCLC . . . carried out many of its activities through commercial corporations and political committees," and that "LaRouche controlled the NCLC, including its fundraising operations and its finances." *United States v. LaRouche*, 896 F.2d 815, 818 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990). The court noted that "LaRouche's dissatisfaction [with the fundraising performance of his associates] also precipitated aggressive fundraising tactics," and cited testimony that "LaRouche characterized adequate fundraising as essential to get him to the White House and without his presence in the White House there was 'no hope for mankind.'" *Id.* at 819. Moreover, he "told [his fundraisers] that 'any means short of thievery or thuggery [was justified] to raise that money.'" *Id.* Mr. LaRouche is still in federal prison serving a fifteen-year sentence for fraudulent fundraising and conspiracy to defraud the Internal Revenue Service. (App. 46a.)[5]

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[5] Mr. LaRouche and a number of his associates had previously been indicted by a federal grand jury in Boston for obstruction of justice resulting from an attempt to interfere with the grand jury's investigation of evidence of credit card and loan fraud in LaRouche's 1984 presidential campaign. After four months of trial, a mistrial was declared because of hardship to several jurors. *See United States v. The LaRouche Campaign*, 695 F. Supp. 1317 (D. Mass. 1988), *aff'd*, 866 F.2d 512 (1st Cir. 1989). Although a retrial was scheduled, the case was dismissed by the government after LaRouche was convicted in Virginia. (App. 51a.)

E. The Administrative Proceedings

On November 11, 1991, Mr. LaRouche submitted a letter of candidate agreements and certifications, together with a threshold submission, in an effort to establish his eligibility to receive public funds under the Matching Payment Act for the 1992 election cycle. Mr. LaRouche's candidate letter contained language designed to limit his personal responsibility under 26 U.S.C. § 9033(a) to furnish any requested financial records and other information to the Commission for review.[6] After the Commission's General Counsel concluded that this letter did not meet the requirements of 26 U.S.C. § 9033 and 11 C.F.R. §§ 9033.1 and 9033.2, Mr. LaRouche submitted a revised letter containing language that conformed to the statutory and regulatory requirements. (App. 23a.)

On December 19, 1991, the Commission made an initial determination, pursuant to 11 C.F.R. § 9033.10(b), that Mr. LaRouche was not eligible for federal matching funds. (App. 23a.) The Commission concluded that Mr. LaRouche's long record of fraudulent submissions and repudiation of promises in prior candidate agreements, along with his conviction and imprisonment for fraudulent fundraising from political supporters and for conspiracy to defraud another federal agency, established that the promises in his candidate agreement were inadequate to provide the assurances of compliance contemplated by the statute. (App. 23a-24a.) On January 2, 1992, the Commission issued its Statement of Legal and Factual Reasons for this decision. Mr. LaRouche submitted two responses to this Statement of Reasons and also provided

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[6] In paragraph VIII of his candidate letter, LaRouche promised only to produce such records "to the extent such receipts and disbursements pertain to my presidential primary campaign, and to the extent I or my authorized committee(s) have the legal authority to obtain and furnish such information." (App. 22a-23a, 53a.)

additional information requested by the Commission. (App. 25a.)

On February 27, 1992, after reviewing all the additional evidence and arguments, the Commission made a final determination, pursuant to 11 C.F.R. § 9033.10(c), that Mr. LaRouche had failed to establish his eligibility to receive federal matching funds for the 1992 election cycle. (App. 59a.) In its Statement of Legal and Factual Reasons (App. 19a-58a), the Commission found (App. 34a) that "all of Mr. LaRouche's various campaigns have demonstrated similar patterns of noncompliance, and in some instances fraud, and are consistent with the fraudulent fundraising practices that were the subject of his criminal conviction." The Commission concluded that Mr. LaRouche's conviction for fraudulent fundraising practices and consistent pattern of repudiated candidate agreements and fraudulent submissions to the Commission established "that the promises Mr. LaRouche makes in his new candidate agreement submitted pursuant to 26 U.S.C. § 9033 do not supply the kind of assurances of compliance with the law that Congress intended to require" (App. 56a).

F. The Court of Appeals's Decision

On March 3, 1992, Mr. LaRouche filed a petition in the United States Court of Appeals for the D.C. Circuit, pursuant to 26 U.S.C. § 9041, for review of the Commission's final determination denying him eligibility for matching payments for the 1992 election cycle.[7] On July 2, 1993, the court of appeals, one judge dissenting in part and concurring in part, reversed the Commission's determination, concluding that the

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[7] He and his committee also filed a motion for emergency relief and expedited briefing. The D.C. Circuit denied this emergency motion on March 17, 1992, concluding that "[p]etitioners have failed to demonstrate that the decision under review is subject to substantial challenge."

Matching Payment Act does not authorize the Commission to deny eligibility because it finds that a candidate's promises are unreliable.

The majority refused to defer to the Commission's construction of the statute because it found "the language, structure and purpose of the Act to be inconsistent with the Commission's interpretation" (App. 6a). The FECA, the majority noted (App. 7a), expressly grants the Commission authority to initiate enforcement proceedings for violations after certification. In contrast, the Matching Payment Act is silent regarding Commission authority to evaluate the reliability of candidate agreements by considering the candidate's past record of violating such agreements. From the statute's silence, the majority inferred (App. 7a-8a) that the Commission is precluded from making such a judgment. This restriction on the Commission's powers is necessary, the majority stated (App. 8a, 9a), to ensure that matching funds are distributed promptly and that the statute is administered in a nondiscriminatory manner. Moreover, in the majority's view, First Amendment considerations support judicially circumscribing the Commission's normal administrative authority to decide how to construe and administer the Act. (App.12a.)

Judge Wald dissented in part, concluding that "the statute gives the Commission the authority, if not the duty, to consider a candidate's filings and conduct in past publicly-financed campaigns when certifying her eligibility to receive further public funds" (App. 16a). Although Judge Wald believed that the Commission should not have relied upon Mr. LaRouche's criminal conviction because he had not been convicted of violating the campaign finance laws, she maintained that "the Commission was entitled to conclude that its own records documenting Mr. LaRouche's long trail of broken promises to the FEC revealed the requisite 'patent irregularities suggest-

ing the possibility of fraud.' " (App. 16a) (quoting *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 845-46 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980)).

Judge Wald disagreed with the majority's view that the Commission had made a subjective assessment of Mr. LaRouche's character. Instead, she stated, the Commission had relied upon "objective and quantifiable evidence" that Mr. LaRouche "has filed false reports or defaulted on or repudiated his promises to the Commission in *four* consecutive elections" (App. 17a, emphasis in original). She also found that the majority's other concerns—delay and discriminatory treatment—were unwarranted. Because the Commission's inquiry would be based on information in the agency's own files, it would not involve a lengthy investigation prior to final certification. (App. 17a.) And "so long as the Commission bases its determination on specific, identifiable factors in the record, it is possible to review—and to ensure—the 'evenhanded[ness]' with which it applies the eligibility criteria to different candidates" (App. 17a).

Finally, Judge Wald pointed out that, under principles of deference, the silence of the statute on this issue supports rather than contravenes the Commission's construction. (App. 18a.) "The statute directs the Commission to certify a candidate only after he 'establishes' his eligibility, . . . not after he merely attests to it" (App. 15a). And she noted that the majority had agreed that the Commission could reject formally correct candidate promises in some circumstances:

> [T]he Commission is entitled to make the same determination not only as to a candidate whose statutory promises are contradicted by his whispered aside that he intends to welsh on his commitments . . . but also a candidate with documented overt acts of welshing on his similar commitments to the Commission in four out of four prior elections.

(App. 15a-16a.) Accordingly, Judge Wald would have remanded the case to the Commission to redetermine whether Mr. LaRouche was eligible, without relying upon his criminal conviction.

REASONS WHY THE PETITION SHOULD BE GRANTED

The Commission concluded in this case that the statutorily required promises submitted by Lyndon LaRouche were insufficient to establish his eligibility for public financing under the Matching Payment Act because of his persistent 15-year record of submitting fraudulent materials to the Commission in support of fund requests and repudiating or disregarding the *identical* promises submitted to obtain public funding in his four previous campaigns. This pattern of fraudulent activity in his quest for public funds was further confirmed by Mr. LaRouche's conviction and imprisonment for similar fraudulent fundraising from the public, and for conspiracy to defraud another federal agency, the Internal Revenue Service.

The court of appeals did not question the facts upon which the Commission relied. (App. 4a.) It ruled instead that the statute requires the Commission to certify for public financing *any* candidate satisfying the other eligibility criteria who submits the prescribed promises written in the proper form—no matter how lengthy, consistent, and purposeful the candidate's record of repudiating the same promises in past election campaigns. This decision eliminates the Commission's power to protect the public fisc from fraudulent manipulation even by applicants with established records of fraud like Mr. LaRouche, who is now assured of obtaining a new certification for public funds every four years, no matter how often he is found to have disregarded and repudiated his candidate agreements.[8]

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[8] The post-election recoupment procedures cited by the court below (App. 7a) are no substitute for the initial denial of the use of public funds

The decision of the majority below conflicts with the views of two other courts,[9] and runs contrary to this Court's view that " '[m]en must turn square corners when they deal with the Government,' " *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984) (quoting *Rock Island, A & L.R. Co. v. United States*, 254 U.S. 141, 143 (1920)).

> This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds.

Id., 467 U.S. at 63. The court below turns this principle on its head by giving dispositive effect to the absence of explicit language in the statute "requiring that the 'agree[ments]' of

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to an applicant with a persistent pattern of fraud. Those remedial procedures are lengthy and complex, and at best will usually result in an enforceable order only several years later, *after* the candidate has already spent the federal funds to which he was not entitled. Moreover, if the candidate has no other financial resources when such a repayment order becomes final, the public funds may never be recovered.

[9] Because Commission determinations under the Matching Payment Act are directly reviewable only in the D.C. Circuit, 26 U.S.C. § 9041(a), there is no possibility of a direct conflict among the circuits on this issue. However, in rejecting an appeal brought by LaRouche against another party on a related issue, the Fourth Circuit agreed with the Commission's initial determination of ineligibility in 1984 (*see* p. 8, *supra*), finding that "the FEC legitimately concluded that LaRouche's § 9033(a)(3) agreement for the 1984 presidential election was inadequate" because of "LaRouche's failure to honor his § 9033(a)(3) agreement concerning the 1980 presidential election," *LaRouche v. State Board of Elections*, 758 F.2d 998, 1000 (4th Cir. 1985). A district court hearing a suit against the Commission by Mr. LaRouche's associates also found this decision to be "legally sound," *Spannaus v. FEC*, 641 F. Supp. 1520, 1526 (S.D.N.Y. 1986), *aff'd mem.*, 816 F.2d 670 (2d Cir. 1987).

§ 9033(a), or the certification of a commitment to adhere to campaign expenditure limits in § 9033(b)(1), be 'in good faith' or trustworthy" (App. 7a). This is a particularly perverse way to construe a statute like the Matching Payment Act, which is designed to reduce the potential for corruption of presidential candidates and election campaigns, and it disregards the general judicial recognition that government agencies have inherent authority to protect the integrity of their programs and procedures from abuse and fraudulent manipulation.[10] Congress need not enact explicit statutory language "to say anything so patent as that persons who have engaged in fraud . . . may be removed from the rolls." *Rush v. Smith*, 573 F.2d 110, 115 (2d Cir. 1978) (applying Aid For Dependent Children statute).

The court below acknowledged (App. 6a) that the Commission's construction of the statute (both in its regulation, 11 C.F.R. § 9033.4(b), and in its decision in this case) as authorizing consideration of a candidate's established record of fraudulent submissions in determining whether his newly submitted candidate agreement is adequate to "establish [ ]his eligibility" for public financing, 26 U.S.C. § 9036(a), is entitled to judicial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See also, FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 45 (1981) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded."). If the statute is "silent or ambiguous with respect to the specific issue," the court is limited to determining whether the agency has adopted "a permissible construction of the statute." *Chevron*, at 842-43. The agency's construc-

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[10] *See, e.g., S & E Contractors v. United States*, 406 U.S. 1, 15-16 (1972); *Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386, 393-94 (D.C. Cir. 1993).

tion must be accepted "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991).

The decision below exceeded these limits on judicial review by rejecting the Commission's construction of the Matching Payment Act without identifying any language in the statute or the legislative history expressing a contrary congressional intent on "the precise question at issue." *PBGC v. LTV Corp.*, 496 U.S. 633, 647 (1990). The court relied instead on "[t]he principle of *expressio unius*" (App. 7a), which is in any context " 'a questionable one in light of the dubious reliability of inferring specific intent from silence,' " *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 2537-538 (1991) (quoting Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n. 182 (1990)). Under *Chevron*, statutory silence requires deference to the agency, not rejection of the agency's construction. Thus, because "*expressio unius* [is] insufficient to establish unambiguous intent under *Chevron*," *Cheney Railroad Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir.), *cert. denied*, 498 U.S. 985 (1990), the courts "must defer to [an agency's] refusal to read the Act in the manner suggested by the *expressio* canon if its interpretation is otherwise reasonable." *Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991).

Even if the *expressio* canon were relevant generally to review of agency construction of statutes under *Chevron*, it is inapplicable to the Matching Payment Act. Congress's enactment of other post-election remedial procedures that could be used to address candidate actions that would also violate the promises in a candidate agreement does not evince an intention to preclude the Commission from denying eligibility to a candidate whose record of disregarding those promises is already established at the time he or she seeks eligibility for

federal funds. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (rejecting use of *expressio unius* canon to eliminate alternative remedies in construing a statute). As noted *supra*, p. 16, n.8, such post-election remedies are less effective in protecting the public fisc and the integrity of the statutory scheme and Congress expressed no intention that post-election remedies be considered exclusive. To the contrary, Congress explicitly provided a post-election remedy that supplements the Commission's authority under 26 U.S.C. § 9036(a) to determine in advance the amounts to be paid to eligible candidates.[11] This makes clear that Congress's provision of post-election remedies does not oust the Commission of authority to consider the same issues in making its initial determinations, when the record permits. "[T]he contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion. Such a contrast (standing alone) can rarely if ever be the 'direct[ ]' congressional answer required by *Chevron*." *Cheney Railroad*, 902 F.2d at 69 (emphasis in original).

The policy concerns cited by the court of appeals are equally unavailing under *Chevron*, both because they are general concerns that are not reflected in the language of the statute, and because they are inapplicable to what the Commission actually did here. The Commission did not, as the court apparently believed (App. 8a, 10a), deny eligibility to Mr. LaRouche on the basis of an evaluation of his overall character, nor did it discredit his statements on the basis of a subjective evaluation

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[11] The Commission's initial certifications of the amount a candidate is entitled to receive are to be reexamined in an audit after the election, 26 U.S.C. § 9036(b). If the Commission determines that the candidate received more than his or her proper entitlement, it can require repayment of the excess. 26 U.S.C. § 9038(b)(1).

of his demeanor. The Commission's rejection of Mr. LaRouche's candidate agreement was firmly based upon an objective record of his established pattern of disregarding and repudiating the *same* promises, which he had made four times before in the same circumstances—to obtain federal campaign financing under the Matching Payment Act. Such an objective record of prior fraudulent activity in identical circumstances is specifically relevant to determining whether LaRouche's current promises are fraudulent, and not merely evidence of his overall character.[12]

The Commission expressed no opinions about Mr. LaRouche's political positions or his fitness for office, and it expressed no view about whether he deserved anyone's vote. Some voters may have been influenced by this determination by the Commission, but *any* action taken against (or in favor of) a candidate by a governmental body may influence voters, and there is certainly nothing in the statute suggesting that the Commission should refrain from fulfilling its statutory duties when its decisions might hurt (or help) a candidate's election chances. The Commission's obligation during an election year, like that of any other governmental agency, is to administer and enforce the statutes within its jurisdiction, resolving issues that are relevant under the procedures established by Congress just as it did here. The Commission's performance of this role

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[12] *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused"); *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1233 (D.C. Cir. 1989) (concurring opinion of two judges) ("professions of future compliance are not credible when proffered by persons who have deliberately broken the law and lied to the [decision maker] in the past"); *United States v. Lavelle*, 751 F.2d 1266, 1276 (D.C. Cir.), *cert. denied*, 474 U.S. 817 (1985) ("Evidence of . . . false testimony in other instances" is relevant to "specific intent to deceive and not merely evidence of . . . general bad character").

does not preempt the voters' ability to make their own evaluation of candidates any more than an Internal Revenue Service assessment for unpaid taxes or a traffic court's sentence for driving while intoxicated.

The remaining points relied upon by the court of appeals are contrary to this Court's precedents. The court of appeals opined (App. 8a) that Congress intended that funds be distributed under the Matching Payment Act "on a non-discriminatory basis" and that the Commission's construction of the statute "would imperil the assurance of evenhanded treatment." However, this Court has long recognized a strong "presumption of honesty and integrity in those serving as adjudicators," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), and the court of appeals identified nothing in the 18-year history of the Commission that calls into question the evenhandedness of the Commission's administration of the Matching Payment Act.[13] Congress created the Commission and entrusted it with the responsibility to make public financing certifications, and it is not the function of the courts to restrict that authority on the basis of their own speculative concerns. As Judge Wald

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[13] Not only has the Commission certified a number of minor party candidates for public financing over the years, but it certified Mr. LaRouche himself in three election campaigns, going to great lengths in an unsuccessful effort to devise special procedures that would permit continued financing while adequately protecting against his fraudulent activities. *See* pp. 8-10, *supra*. As the Commission noted, violations of the campaign financing statutes have been committed by other presidential campaigns receiving public financing, but "[n]o other publicly funded candidate has established a pattern and practice of submitting false information to the Commission nor has another campaign admitted to knowing and willful violations . . . for submitting false or misleading information regarding contributions submitted for matching" (App. 54a). There is nothing discriminatory in "accord[ing] unique treatment to a unique application." *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 848 n.24 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

observed, in this area as with every other reviewable administrative decision, "so long as the Commission bases its determination on specific, identifiable factors in the record, it is possible to review—and to ensure—the 'even-handed[ness]' with which it applies the eligibility criteria to different candidates." (App. 17a.)

Finally, the court of appeals' reliance (App. 12a) upon "First Amendment concerns" identified in two of its own early decisions under the public financing statutes also contradicts this Court's precedents. The Commission's decision here did not interfere in any way with Mr. LaRouche's right to campaign for the presidency or his ability to raise and spend campaign contributions to advocate his election. The *only* effect of the Commission's decision was that Mr. LaRouche was denied a subsidy for these activities from public funds. For at least a decade this Court has held that a governmental decision "not to subsidize the exercise of a fundamental right does not infringe that right." *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983). *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 n.9 (1986) ("there is no [constitutional] right to have speech subsidized by the government"). "Plainly, campaigns can be successfully carried out by means other than public financing; they have been [in the past] and this avenue is still open to all candidates." *Buckley v. Valeo*, 424 U.S. 1, 101 (1976). Whether or not the Commission abused its discretion in construing the Matching Payment Act to deny Mr. LaRouche eligibility for public financing is, therefore, a question of statutory construction not of constitutional right, and the First Amendment provides no basis for the court of appeals to disregard the limits of deferential review established by this Court in *Chevron*.[14]

[14] Both of the cases relied upon by the court of appeals, *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834 (D.C. Cir. 1979), *cert.*

In sum, the principle adopted by the court below—that absent express statutory language to the contrary, public funds can be obtained on the basis of agreements identical to those the applicant has repeatedly refused to honor in the past—not only violates the limits this Court has imposed upon judicial review, but conflicts with established principles essential to the effective protection of the public fisc. A decision that prevents the Commission from administering effectively a program designed by Congress to help ensure the integrity of our presidential candidates and campaigns is a matter of obvious national concern that should not be permitted to stand without plenary review by this Court.

The decision below is likely, however, to undermine the success of this important program in an even greater way. The availability of funds for the public financing of presidential campaigns rests entirely upon the voluntary designation by millions of individual taxpayers of a small portion of their taxes for this purpose. 26 U.S.C. §§ 6096, 9006, 9037.[15] Thus, the success of the federal campaign financing system in "eliminating the improper influence of large private contributions" on presidential candidates and "relieving major-party Presi-

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denied, 444 U.S. 1074 (1980), and *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538 (D.C. Cir. 1980), were issued prior to this Court's *Regan* and *Chevron* decisions, discussed in the text. Both cases affirmed Commission actions, but on the basis of the court's own construction of the statute, rather than by employing deferential review of the Commission's construction. Both cases also relied upon First Amendment concerns in devising restrictions on the Commission's authority that were not based upon statutory language. Of course, to the extent that these appellate decisions are inconsistent with this Court's later precedents, they are no longer good law.

[15] Because of existing shortfalls, Congress recently increased the amount of this designation from one to three dollars. *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title XIII, Part 5, Sec. 13441, 107 Stat. 567 (Aug. 10, 1993).

dential candidates from the rigors of soliciting private contributions," *Buckley v. Valeo*, 424 U.S. at 96, is uniquely dependent upon the public's confidence in the integrity of the program. The decision below, holding that the Commission is obligated to certify at least $100,000 in public financing to a candidate who has persistently engaged in fraudulent actions to obtain matching funds and is currently imprisoned for having conspired to defraud the Internal Revenue Service and his own contributors, can only diminish public confidence in the integrity of the program and discourage taxpayers from designating their tax dollars for this purpose. A decision with this sort of impact on the success of such an important public remedial statute warrants plenary review by this Court.

CONCLUSION

For the reasons stated above, the Federal Election Commission's petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

LYNDON H. LAROUCHE AND DEMOCRATS FOR ECONOMIC RECOVERY-LAROUCHE IN '92, RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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TO THE FEDERAL ELECTION COMMISSION'S
PETITION FOR WRIT OF *CERTIORARI*

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 14, 1993 Decided July 2, 1993

No. 92-1100

LYNDON H. LAROUCHE AND DEMOCRATS FOR ECONOMIC RECOVERY-LAROUCHE IN 92, PETITIONERS

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

Petition for Review of An Order of the Federal Election Commission

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James F. Schoener argued the cause for petitioners. With him on the brief was *Richard Mayberry.*

Richard B. Bader, Associate General Counsel, Federal Election Commission, argued the cause for respondent. With him on the brief were *Lawrence M. Noble,* General Counsel and *Marcus C. Migliore,* Attorney, Federal Election Commission.

Bill of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, BUCKLEY and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WALD.

WILLIAMS, *Circuit Judge*: The Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-42 ("Matching Payment Act" or "the Act"), sets forth specific requirements that must be satisfied before the Federal Elections Commission certifies a candidate for receipt of matching funds. The key criteria are expressed in § 9033(a), which requires that an applicant "agree" to various commitments to keep and supply records that the Commission might find useful for enforcement of the statutory requirements as to use of campaign funds; and in § 9033(b), which requires a commitment as to prospective use of campaign funds and a representation as to past receipt of a minimum quantity of small campaign contributions from many states.

Although the papers filed by individual petitioner Lyndon H. LaRouche, Jr. and his campaign organization, Democrats for Economic Recovery – LaRouche in 92 (collectively "LaRouche") concededly provided the agreements and commitments required by § 9033, and although the Commission did not contest the truth of LaRouche's representations as to contributions received, it nonetheless denied him certification for matching funds for the 1992 election cycle. In essence, the Commission inferred from various factors in LaRouche's background – including his prior dealings with the Commission and his conviction for fraud partially involving election-related activities – that LaRouche's agreements and commitments were not made "in good faith". Because we agree with LaRouche that the statute gives the Commission no authority to engage in such an assessment of candidates, we reverse.

* * *

On November 18, 1991 LaRouche filed with the FEC to receive matching funds for his campaign. His submission consisted of a Candidate Letter of Agreements and Certifications, along with supporting documentation. Shortly thereafter, the Commission replied that the letter was defective because it contained language limiting LaRouche's personal responsibility under § 9033(a) to furnish financial records and other information for FEC review. LaRouche then submitted a revised letter. The Commission does not dispute that the new submission formally satisfied the statutory and regulatory requirements.

The Commission nonetheless made an initial determination that LaRouche was not eligible for matching funds, which it explained in a Statement of Legal and Factual Reasons. LaRouche submitted responses to the initial determination, including offers to supply whatever documentation the Commission needed to verify the legitimacy of his filings. After reviewing the campaign's responses, the Commission issued a final determination of ineligibility. Statement of Legal and Factual Reasons: Final Determination of FEC Regarding Application of Lyndon H. LaRouche Jr. for Presidential Primary Matching Funds, Joint Appendix ("J.A.") 255 ("Final Determination").

The Commission based its denial on LaRouche's alleged history of non-compliance with the Act, as well as on his criminal indictments and convictions. The Final Determination specifically referred to the following: (1) In 1976 the Commission found LaRouche ineligible for matching funds because he had listed invalid contributions to meet the certification threshold. (2) In 1980 the Commission found LaRouche eligible to receive funds, but a subsequent audit turned up various violations leading to a

$15,000 penalty. LaRouche denied personal liability for the penalty, making arguments about the meaning of his candidate letter that appear at best flimsy and at worst casuistical, and paid only when forced to do so as a condition for receiving matching funds in 1984. (3) In the 1984 election cycle LaRouche's campaign vehicle engaged in substantial campaign irregularities, including unauthorized charges against the credit cards of persons who had not agreed to contribute to the campaign; LaRouche refused to turn over documents for purposes of an audit into these events. (4) In 1988, after an audit disqualifying certain purported contributions, followed by documentation of additional contributions, the Commission certified LaRouche for funds. (5) A federal jury convicted LaRouche in 1988 on several counts of mail fraud. While it is plain that a substantial portion of the evidence involved fraud in the raising of campaign funds, the parties dispute whether such evidence was essential to the conviction. The conviction was indisputably not for violation of election laws. J.A. 265-78. We assume for purposes of this case that the Commission's findings of past misconduct by LaRouche were entirely valid.

The Final Determination is quite clear that the Commission viewed LaRouche's past misconduct as going to the substantiality of LaRouche's agreements and commitments, *not* as bearing on the credibility of his representations as to campaign contributions already received. The Determination said that the Commission need not ignore "behavior which convinces it that *promises* made to secure eligibility to receive public financing are not made in good faith." J.A. 261 (emphasis added). And it concluded that there was "a clear basis . . . to determine that Mr. LaRouche's candidate *agreement* cannot be accepted on its face." *Id.* at 278 (emphasis added).

* * *

The statute controlling the Commission's disposition of applications for matching funds provides in pertinent part as follows:

§ 9033 Eligibility for payments

(a) Conditions

To be eligible to receive payments under section 9037, a candidate shall, in writing—

(1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses,

(2) agree to keep and furnish to the Commission any records, books, and other information it may request, and

(3) agree to an audit and examination by the Commission under section 9038 and to pay any amounts required to be paid under such section.

(b) Expense limitation; declaration of intent; minimum contributions

To be eligible to receive payments under section 9037, a candidate shall certify to the Commission that—

(1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035,

(2) the candidate is seeking nomination by a political party for election to the office of President of the United States,

(3) the candidate has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States, and

(4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.

26 U.S.C. §§ 9033(a) & (b). Once the candidate "establishes his eligibility" under § 9033, the Act directs the Commission to certify him for matching funds within ten days.

The sole issue before us is whether the Matching Payment Act permits the Commission to withhold matching funds on the basis of its assessment of evidence leading it to distrust the agreements and commitments made by an applicant under § 9033(a) & (b). Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), unless Congress has clearly resolved the issue, we must sustain the Commission's position if it is reasonable. We believe Congress has clearly resolved the issue; we find the language, structure and purpose of the Act to be inconsistent with the Commission's interpretation.

We may dispose at the outset of the Commission's reliance on one of its regulations, 11 CFR § 9033.4(b), which provides that, in evaluating a candidate's submission,

> the Commission may consider other information in its possession, including but not limited to past actions of the candidate in an earlier publicly-financed campaign, that is relevant to a determination regarding the candidate's eligibility for matching funds.

Putting aside the elusive question of whether or in what sense LaRouche's 1988 conviction can be said to have been "in [the Commission's] possession", the regulation does not even purport to answer the question before us. It permits the Commission to consider information that is "relevant to a determination regarding the candidate's eligibility", but it doesn't attempt to define what subjects are relevant. Even if it did, the regulation would of course be valid only to the extent that it conformed to the statute.

The language of the statute includes no modifiers requiring that the "agree[ments]" of § 9033(a), or the certification of a commitment to adhere to campaign expenditure limits in § 9033(b)(1), be "in good faith" or trustworthy. It is of course true that Congress could have secured the applicant's legal commitment simply by providing that any application would be deemed to commit the candidate to the obligations stated, so we may infer that Congress sought more. One benefit that Congress secured by requiring express, signed commitments was to focus any applicant on the obligations to be undertaken, which an automatic commitment arising by operation of law would not do. Thus the congressional insistence on explicit agreement by the applicant can be explained without our inferring any general authority in the Commission to evaluate the reliability of the agreement.

LaRouche notes that the Matching Payment Act provides for examination and audit of actual campaign expenses under § 9038, and that in 2 U.S.C. § 437(g) Congress has expressly granted the Commission post-certification authority to initiate civil and criminal actions and investigations to enforce the provisions of the Act when apprised of past or ongoing violations. He suggests we may infer from those express provisions an intent in § 9033(a) & (b) to withhold authority to make the sort of judgment that the Commission made here. See also 2 U.S.C. § 437d(a)(6) (granting authority to initiate civil enforcement actions); 26 U.S.C. § 9042(c) (providing criminal penalties for supplying false information or failing to supply records or information properly requested by the Commission). The principle of *expressio unius* is often invoked, see, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 113 U.S. 1160, 1163 (1993); *United States v. Lopez,* 938 F.2d 1293, 1297 (D.C. Cir. 1991), but also often rejected, see, e.g., *Cheney Rail-*

road v. ICC, 902 F.2d 66, 68-69 (D.C. Cir. 1990) (citing cases). Here we think that the character of the statutory mandate makes the maxim quite suitable, at least as applied to the power here claimed by the Commission. The object of the statute is to enhance the ability of candidates to present their positions and themselves to voters in presidential primaries. Senate Report No. 93-689, 2d Sess. 6 (1974). One of the characteristics with which voters will surely be concerned is the character and integrity of a candidate and the strength of her commitments to what she says. It would seem to contradict the purpose of enhancing voters' ability to assess candidates to shift any part of that process away from voters and to the Federal Elections Commission.

Moreover, it was Congress's explicit intention that the funds be issued on a non-discriminatory basis. Senate Report No. 93-689 at 10. As we said in *Committee to Elect Lyndon LaRouche v. Federal Election Commission*, 613 F.2d 834 (D.C. Cir. 1979) ("*CTEL*"), "we regard it as particularly important to ensure that the Commission is applying the eligibility criteria for primary matching funds in an even-handed manner." *Id.* at 844. Any inquiry into the bona fides of candidates' promises would take the Commission into highly subjective territory that would imperil the assurance of even-handed treatment.

Our prior decisions support, even if they do not compel, a construction of the Matching Payment Act that denies the Commission authority to engage in such subjective inquiries. In *CTEL* LaRouche argued for a somewhat confusing standard for Commission evaluation of his satisfaction of the requirements of § 9033(b)(3) & (4), which relate to past campaign contributions received. He claimed that an applicant "need only 'attest authoritatively' in good faith and with knowledge that he has met the fundraising

threshold." 613 F.2d at 840. We rejected that standard in favor of an interpretation under which the Commission is, as an initial matter, simply to assess (1) whether the submission adequately documents compliance with the fundraising requirements and (2) whether "[the] submission (or [the] submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud." *Id.* at 842. If both inquiries were favorable to the candidate, the Commission was to certify him as eligible; only if the second inquiry showed patent irregularities could the Commission conduct external inquiries as part of the certification process. *Id.*

In reaching this interpretation, we rejected not only the subjective assessment that LaRouche then proposed, but also the Commission's claim that it was free, even absent patent irregularities in the candidate's submissions, to embark on an investigation into his records and to interview supposed contributors. *Id.* at 840. We stressed that both inquiries in the initial phase "involve[d] essentially objective determinations regarding the adequacy of the threshold submission." *Id.* at 844. We said that the "national commitment to open and robust discussion" (citing *New York Times v. Sullivan*) made it especially important to assure that the criteria were applied "in an evenhanded manner", thus supporting our choice of "objective standards" over those proposed by LaRouche. *Id.* at 844. We inferred the limits on the Commission's inquiry from Congress's stated concern for speedy resolution of candidates' applications. *Id.* at 841-44.

Nonetheless, emphasizing the language of *CTEL* allowing Commission consideration of not only the candidate's submission but also "that submission together with other reports on file", *id.* at 842, the Commission claims that it can also deny funding if such information undermines a

candidate's promises under § 9033(a) and § 9033(b)(1). Respondent's Brief at 21-22.

We find nothing in *CTEL* that supports the Commission's claim and much that militates against it. The Commission's authority to look at its own files for purposes of assessing representations as to objectively verifiable propositions (what contributions the candidate has received in the past), and to look elsewhere if the submissions and Commission files show "patent irregularities", hardly implies authority to impose comparatively subjective criteria for assessing candidates' promises. The conceded authority is to engage in a counting exercise; the authority now claimed is to evaluate a candidate's character. *CTEL*'s stress on the importance of objective criteria is hardly consistent with the sort of unbounded inquiry the Commission proposes.

Contrary to its belief, the Commission is not assisted by our decision in *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir. 1980). *Carter-Mondale* addressed a request by the Carter-Mondale committee that the court order the Commission to withhold certification (and later, after certification occurred, to reverse certification) of the Reagan-Bush campaign for funds under the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 et seq., or, in the alternative to order the Commission to start an investigation of certain violations that the plaintiffs alleged the Reagan-Bush campaign had committed or would in the future commit. *Id.* at 541, 542. As the Commission was in fact investigating alleged irregularities, the court held that the issue was within the exclusive jurisdiction of the Commission. *Id.* at 542. We included the following disclaimer:

> We add, however, that we are not interpreting the statute as barring the FEC from deciding as a matter

> of policy that it will investigate a complaint, a request for funds, or conduct during a political campaign if it reasonably appears that a patent fraud or other major violation of law is being committed. . . .

Id. at 544.

The Commission's theory seems to be that, because in *Carter-Mondale* we recognized that the requirements of the Fund Act were primarily forward-looking (i.e., promises to adhere to specified rules), see *id.* at 544-45 n.8, the dictum must mean that the court believed the Commission was entitled to embark on broad inquiries into the bona fides of promises made under either act. When a court says that it is "not interpreting" a statute as having a specified meaning, it seems best to take the court at its word—it is simply not passing on the hypothesized interpretation. Apart from that, the court's overall discussion runs against the Commission's reading. First, we noted that "an application of the largely future-looking eligibility criteria . . . will depend on investigations conducted *after* certification, whereas compliance with the historical, objective criteria of the [Act] can be measured before certification." *Id.* (citing *CTEL*; emphasis added). Furthermore, the quoted disclaimer is almost immediately preceded by a remark that *CTEL* "precludes withholding funding from a candidate once the *objective* criteria for eligibility are met." *Id.* at 544 (emphasis in original). We went on to say that "Nothing requires the Commission to be ineffective in assuring that only candidates who meet the *objective* criteria of the statute for federal election funds are to receive money from the federal treasury," *id.* at 544-45 & n.8 (emphasis added). In fact, the Fund Act requires certification as to past facts—that no contributions of a specified class "have been or will be accepted by such candidates". 26 U.S.C. § 9003(b)(2). Thus the court may

simply have had that backward-looking concern in mind. Alternatively, the court may have considered the possibility that violations committed *within* a campaign might entitle the Commission to withhold future payments as a kind of offset. We find nothing in *Carter-Mondale* to undermine *CTEL*'s general view that in the absence of an explicit authorization by Congress the Commission may not deny funds on the basis of its view of a candidate's subjective intent.

The Commission finally suggests that *Regan v. Taxation with Representation,* 461 U.S. 540 (1983), has eliminated the First Amendment considerations underlying the interpretive approach of *CTEL* and *Carter-Mondale. Regan* held that Congress could, consistent with the First Amendment, condition tax-exempt status on an entity's refraining from substantial lobbying activity and even that it could impose the condition selectively. See *id.* at 546-51. But although the government enjoys greater leeway in provision of benefits than in outright prohibitions, even benefits remain subject to First Amendment limits. Indeed, the Supreme Court has recently observed that the entire public forum doctrine is in effect a constitutional restriction on the allocation of a government subsidy (in the form of government-owned property). *Rust v. Sullivan,* 111 S. Ct. 1759, 1776 (1991). And, since *Regan,* the Court has applied First Amendment restraints to the government's conduct as employer, see *Rankin v. McPherson,* 483 U.S. 378 (1987), and on the selective provision of tax exemptions, *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987). *Regan* does not, therefore, eliminate the First Amendment concerns of our prior cases.

Of course the Commission is free to insist that the candidate state his agreement to all the statutory requirements, with no impermissible qualifications or omissions,

as it did in rejecting LaRouche's initial 1991 filing. There may be other cases where, without assessment of subjective candidate intent, the Commission might conceivably withhold funds despite formal compliance with the statutorily expressed criteria. Suppose, for example, a candidate, like a melodrama villain, whispers an aside that he intends to welsh on his commitments. Or suppose a candidate has failed to pay a penalty assessed for violations in a previous campaign cycle. Compare *Spannaus v. FEC*, 641 F. Supp. 1520 (S.D.N.Y. 1986). We do not pass upon these hypotheticals. The key here is that the Commission is not authorized to appraise candidates' good faith, honesty, probity or general reliability when reviewing the agreements and other forward-looking commitments required by § 9033(a) & (b).

* * *

Petitioners ask that we direct the Commission "to certify [their] threshold submission for disbursement by the U.S. Treasury, for all qualified uses to which [the campaign] is by law entitled." Petitioners' Brief at 48. As the Commission has offered only one basis for withholding certification, which we find invalid, we reverse and remand with instructions to certify and for such other proceedings as may be appropriate.

So ordered.

WALD, *Circuit Judge,* concurring in part and dissenting in part: I agree with the majority that the Federal Elections Commission ("FEC" or "Commission") exceeded its statutory authority in its investigation of Mr. LaRouche, but I believe it did so only in its consideration of the convictions for mail fraud, conspiracy to commit mail fraud, and conspiracy to defraud the Internal Revenue Service ("IRS")—convictions not directly and unmistakably related to the conduct of his prior campaigns.[1] I do not believe that the statute requires that the FEC, in determining a candidate's eligibility for public monies, disregard evidence in its own files that indicates that a candidate may well intend to defraud the Commission—and the American taxpayer.

Congress passed the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-42 ("Matching Payment Act"), as part of the Federal Election Campaign Act Amendments of 1974, in the belief that Congress had " 'an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.' " S. REP. NO. 689, 93d Cong., 2d Sess. 7 (1974),

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[1] The FEC claims, and LaRouche disputes, that his convictions on thirteen counts of fraud and conspiracy to defraud involved fundraising from his 1984 campaign. The Commission's claim is constructed from "the indictment, testimony at trial, the jury instructions, and the appeal." When the Commission concocts a theory of liability that relies on the court's denial of the defense motion to instruct the jury on the exclusion of the fundraising practices of political committees, it has strayed not only beyond its area of recognized expertise, but beyond the "circumscribed" inquiry into "patent irregularities" permissible during the certification process. *See Committee to Elect Lyndon LaRouche v. FEC,* 613 F.2d 834, 841, 842 (D.C. Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980) (*CTEL*). We are not faced with the permissibility of the Commission's consideration of a criminal conviction for a direct violation of federal election laws, which I consider a separate and open question.

reprinted in FEC, *Legislative History of Federal Election Campaign Act Amendments of 1974,* at 103 (1977) (quoting *Bullock v. Carter,* 405 U.S. 134, 145 (1971)) ("Senate Report"); H.R. REP. NO. 1239, 93d Cong., 2d Sess. 13 (1974), *reprinted in* FEC, *Legislative History of Federal Election Campaign Act Amendments of 1974,* at 647 (1977) (same). In administering this Act, as well as other election laws, the Commission has broad administrative, policy, investigative, supervisory and oversight powers. *See, e.g.,* 2 U.S.C. § 437c (directing Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" election laws), § 437d(a) (outlining Commission's investigatory powers), § 438(b) (outlining Commission's duties, including the conduct of audits and field investigations of certain political committees); *see also Buckley v. Valeo,* 424 U.S. 1, 109 (1976) (Commission has "primary and substantial responsibility" for enforcing the 1974 election laws). The Matching Payment Act specifically empowers the Commission to certify the eligibility of a presidential primary candidate to receive matching funds. 26 U.S.C. § 9036(a). One of the two criteria for eligibility, as the majority notes, is the candidate's promises to fulfill certain reporting requirements and to cooperate with the Commission in its investigations. *Id.* § 9033(a). The statute directs the Commission to certify a candidate only after he "establishes" his eligibility, *id.* § 9036(a), not after he merely attests to it. Indeed, the majority accepts the Commission's determination that the candidate whose agreements contain impermissible qualifications has not "established" his eligibility. Majority opinion ("Maj. op.") at 11. I believe the Commission is entitled to make the same determination not only as to a candidate whose statutory promises are contradicted by his whispered aside that he intends to welsh on his commitments, *see* Maj. op. at 11, but also a candidate with documented overt acts

of welshing on his similar commitments to the Commission in four out of four prior elections.

As I have said before with regard to a related election statute, I cannot read this Act to require that the Commission, in making its certification, "deliberately blind itself" to "materials that suggest on their face that the candidate intends to violate . . . the eligibility requirements of public funding." *In re Carter-Mondale Reelection Comm.*, 642 F.2d 538, 550, 551 (D.C. Cir. 1983) (per curiam) (Wald, J., concurring in decision to affirm) (*Carter-Mondale*). To the contrary, I believe the statute gives the Commission the authority, if not the duty, to consider a candidate's filings and conduct in past publicly-financed campaigns when certifying her eligibility to receive further public funds.

In *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 845-46 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (*CTEL*), we held that the Act's policy favoring prompt payments required that, during the certification process, the FEC's inquiry into a candidate's eligibility be "circumscribe[d] *to a certain extent.*" *Id.* at 841 (emphasis added). We refused, however, to proscribe any and all Commission inquiry at this point, rejecting the notion that the FEC was confined to "the quite limited task of rubber-stamping notarized statements of eligibility." *Id.* Instead, we concluded that, "where [the candidate's] submission, (*or that submission together with other reports on file with the Commission*) contain[ed] patent irregularities suggesting the possibility of fraud," the Commission was empowered "to conduct a properly circumscribed investigation. . . ." *Id.* at 842 (emphasis added). Here, I believe the Commission was entitled to conclude that its own records documenting Mr. LaRouche's long trail of broken promises to the FEC revealed the requisite "patent irregularities suggesting the possibility of fraud."

I recognize that the *CTEL* court expressed, and the later *Carter-Mondale* court echoed, a "preference for the application of objective standards" in the Commission's determination of a candidate's eligibility for public funds. *See Carter-Mondale,* 642 F.2d at 551 (Wald, J., concurring); *id.* at 544 n.8; *CTEL,* 613 F.2d at 844. Here, a circumscribed inquiry into Mr. LaRouche's documented performance under the Act is consistent with that preference, as it would rely almost entirely on objective and quantifiable evidence. Determining that a candidate has filed false reports or defaulted on or repudiated his promises to the Commission in *four* consecutive elections certainly falls within the Commission's "conceded authority . . . to engage in a counting exercise." *See* Maj. op. at 9. And to the limited extent that the Commission's resulting conclusion as to the validity of the candidate's assurances must involve some degree of subjective judgment, the overall inquiry would still not entail either of the dangers the *CTEL* court associated with open-ended subjective inquiries. First, it would not require a "lengthy investigation[ ]," *CTEL,* 613 F.2d at 844, that would contravene the Act's policy of "prompt payment." Second, so long as the Commission bases its determination on specific, identifiable factors in the record, it is possible to review—and to ensure—the "even-handed[ness]" with which it applies the eligibility criteria to different candidates. *Id.*; *see also* Senate Report at 8-10, FEC Legislative History at 103-05 (expressing concern for fair treatment for minor party candidates). And here the Commission's actions stem from its own interpretation of its responsibilities and its own concerns about the candidate's eligibility, not from an opponent's prodding, *cf. Carter-Mondale,* 642 F.2d at 543 (opposing campaign committee's complaint "highly speculative"), so it presents little danger of partisan motivation.

In the face of the Matching Payment Act's silence on the permissible scope of the FEC's pre-certification inquiry, we determined that the inquiry must be "circumscribed." *CTEL,* 613 F.2d at 842. The Commission has accordingly interpreted the Act and our case law to permit it to consider a candidate's conduct in prior publicly-funded campaigns, and to deny eligibility based on the most egregious past violations. *Explanation and Justification of Title 26 Regulations,* 52 Fed. Reg. 20, 864, 20,868-69 (June 3, 1987). Given the deference we owe the Commission's construction and administration of the statute, *see FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 39 (1981), I cannot conclude that this interpretation was "arbitrary, capricious, or otherwise not in accordance with the law." *See* 26 U.S.C. § 9041; 5 U.S.C. § 706(2)(A); *see also Common Cause v. FEC,* 842 F.2d 436, 439-40 (D.C. Cir. 1988) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984)) ("[W]here 'the statute and its history are silent or ambiguous with respect to a specific issue,' the [Commission's] construction, if reasonable, must ordinarily be honored."). Nor do I believe that expeditious, nondiscriminatory inquiries into candidates' past compliance with federal election requirements, followed by the evenhanded refusal to certify serious violators, runs afoul of the First Amendment. *Cf. Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987) (discriminatory tax exemptions based on content of publications incompatible with First Amendment). Accordingly, I would remand to the Commission for an eligibility determination that considered Commission documentation of Mr. LaRouche's prior publicly-financed campaigns, but not his only arguably related convictions.

APPENDIX B

[SEAL OMITTED]
FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF LEGAL AND FACTUAL REASONS FINAL DETERMINATION OF FEDERAL ELECTION COMMISSION REGARDING APPLICATION OF LYNDON H. LAROUCHE, JR. FOR PRESIDENTIAL PRIMARY MATCHING FUNDS

I. INTRODUCTION

The Commission has made a final determination pursuant to 11 C.F.R. § 9033.10(c) that Lyndon H. LaRouche, Jr. be denied Federal matching funds for the 1992 election cycle. Mr. LaRouche may appeal the Commission's final determination to the United States Circuit Court of Appeals pursuant to 26 U.S.C. § 9041. Pursuant to 11 C.F.R. § 9033.10(c), this Statement sets forth the legal and factual basis for the Commission's determination.[1]

II. APPLICABLE LAW

The Commission must determine that a candidate is in full compliance with all of the requirements for eligibility to receive matching payments before certifying a candidate to receive primary matching funds. *See* 26 U.S.C. § 9036(a); 11 C.F.R. § 9036.1(c). These requirements help

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[1] Throughout this Statement of Legal and Factual Reasons, "FECA" refers to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, and "Matching Payment Act" refers to the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.

the Commission to ensure that only serious candidates receive public funds, that the matching funds are not obtained by fraudulent means, and that they are properly and adequately disclosed.

The Matching Payment Act provides two basic requirements for eligibility. First, a candidate must agree, in writing: (1) to obtain and furnish to the Commission any evidence it requests regarding qualified campaign expenses; (2) to maintain and furnish to the Commission any records or other information it requests; and (3) to submit to an audit by the Commission and to repay any amounts required under section 9038 of the Matching Payment Account Act. 26 U.S.C. § 9033(a). Second, a candidate must certify to the Commission that: (1) the candidate and his or her authorized committee(s) will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035; (2) the candidate is seeking the nomination by a political party for election to the Office of President of the United States; (3) the candidate has received matching contributions which, in the aggregate, exceed $5,000 in individual contributions from residents of each of at least 20 states; and (4) the aggregate of contributions certified with respect to any single contributor does not exceed $250. 26 U.S.C. § 9033(b).

The Commission's regulations provide more detailed requirements of eligibility. Notably, the candidate must agree that he or she will: (1) comply with the documentation requirements of 11 C.F.R. § 9033.11; (2) keep and furnish to the Commission all documentation for matching fund submissions, including any books, records and supporting documentation and other information that the Commission may request; (3) keep and furnish to the Commission all documentation relating to receipts and disbursements including any books, records, all documen-

tation required by section 9033, and other information that the Commission may request; (4) prepare matching fund submissions in accordance with the Commission's *Guideline for Presentation in Good Order*; (5) comply with the applicable requirements of 2 U.S.C. § 431 *et seq.*, and the Commission's regulations; and (6) pay any civil penalties included in a conciliation agreement proposed under 2 U.S.C. § 437g. 11 C.F.R. §§ 9033.1(b)(2), (b)(4), (b)(5), (b)(8), (b)(9), and (b)(10). *See also* 11 C.F.R. §§ 9033.9 and 9033.11; Final Rule on Public Financing of Presidential Primary and General Election Candidates, 56 *Fed. Reg.* 35896, 35904 (July 29, 1991).

In addition to the agreements and certifications required by the Matching Payment Act, the candidate's threshold submission must meet the requirements of 11 C.F.R. § 9033.2(b)(3). The candidate and the candidate's authorized committee(s) must certify that they have received matchable contributions totaling more than $5,000 in each of at least 20 states. 11 C.F.R. § 9033.2(b)(3)(i). Contributions submitted for matching must have been made for the purpose of supporting that particular candidate's election to Federal office. Thus, the contributor must have the requisite donative intent before the Commission can accept the contribution for matching. 11 C.F.R. § 9034.3(i).

The statutes and regulations also allow the Commission to go beyond the face of a threshold submission to determine if there is evidence that the public funding program will be abused. The certification process permits the Commission to take certain steps, including conducting a limited investigation of the committee's finances, to protect the public fisc. For example, the Commission may conduct an inquiry into any submission if it determines additional information is required in relation to certification. *See* 11 C.F.R. § 9039.3(a)(1). If the Commission finds

patent irregularities suggesting the possibility of fraud in materials submitted or in the activities of the candidate or his or her authorized committees, matching payments may be withheld pending the results of an inquiry under this section 11 C.F.R. § 9039.3(a)(3).

The Commission's regulations also provide that the Commission may consider, in addition to the threshold submission, other information in its possession, including the candidate's *past actions* in prior publicly-financed campaigns, in evaluating the candidate's eligibility for matching funds. 11 C.F.R. § 9033.4(b) [emphasis added]. Examples of factors that the Commission may consider include: (1) a candidate's repudiation of an earlier candidate agreement; or (2) the appearance of patent irregularities suggesting the possibility of fraud in earlier matching fund submissions that seem to be recurring in the new request for certification. *See* Explanation and Justification of Title 26 Regulations, 52 *Fed. Reg.* 20864, 20868-69 (June 3, 1987). The Explanation and Justification further states that the Commission can deny eligibility in the most egregious situations. *Id.* at 20869.

III. INITIAL DETERMINATION

On November 18, 1991, Lyndon H. LaRouche/Democrats for Economic Recovery: LaRouche '92 ("the Committee") submitted a letter of candidate agreements and certifications with a threshold submission, seeking eligibility to receive funds under the Presidential Primary Matching Payment Account Act, as amended 26 U.S.C. § 9031 *et seq.* Attachment 1. *See* 26 U.S.C. § 9033 and 11 C.F.R. Part 9033. On November 20, 1991, the Office of General Counsel received a memorandum from the Audit Division summarizing the results of its review of the letter for compliance with the requirements of 11 C.F.R.

§§ 9033.1 and 9033.2 and requesting comments regarding the impact of the candidate's 1988 conviction for fraud related to the fundraising practices of his 1984 campaign on his eligibility to receive matching funds. Attachment 2.

Based on its review of the letter, the Office of General Counsel concluded that the letter did not meet the requirements of 26 U.S.C. § 9033 and 11 C.F.R. §§ 9033.1 and 9033.2.[2] *See* Memorandum to Robert J. Costa, dated November 25, 1991. Attachment 3. Thus, the Office of General Counsel recommended that the Committee revise the letter to comport with the Commission's regulations and the *Guideline for Presentation in Good Order* ("*Guideline*"). The Committee submitted a revised letter of candidate agreements and certifications on December 2, 1991. Attachment 5. The revised letter was complete on its face and appeared to meet the technical requirements of the Matching Payment Act and the Commission's regulations. However, the question remained whether Mr. LaRouche's certification should be accepted at face value given his past actions evidencing the use of fraudulent fundraising practices in his past political campaigns.

On December 19, 1991, the Commission made an initial determination pursuant to 11 C.F.R. § 9033.10(b) that Lyndon H. LaRouche, Jr. be denied Federal matching funds for the 1992 election cycle. The Commission's initial determination was based on several factors. According to the Commission's Statement of Reasons, the Commission considered the fact that Mr. LaRouche is serving a prison

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[2] The Committee inserted the following qualifying language to paragraph VIII, addressing the furnishing of documentation by the committee, ". . . to the extent such receipts and disbursements pertain to my Presidential primary campaign, and to the extent I or my authorized committee(s) have the legal authority to obtain and furnish such documentation."

sentence for a conviction for fraud in connection with the financing practices of his various operations, including practices related to the financing of his 1984 presidential primary campaign. Mr. LaRouche was also convicted of conspiring to defraud another Federal agency, the Internaal Revenue Service. Moreover, the Commission considered the fact that over the 15 year period of his participation in the public funding system, Mr. LaRouche has submitted false information to the Commission, fraudulently induced individuals to contribute to his campaigns and submitted contributions for matching which lacked the requisite donative intent. The Commission found that these activities, combined with his criminal convictions, evidence a pattern and practice of fraudulent fundraising activities by Mr. LaRouche and his associates in connection with his publicly-funded campaigns.

In light of his past actions and his attempt to limit the agreements and certifications, the Commission did not accept Mr. LaRouche's 1992 letter of candidate agreements and certifications at face value because there was no way to guarantee that deceptive fundraising tactics were not tainting his 1992 campaign. The Commission also questioned the viability of his presidential campaign in light of state laws which restrict ballot access to convicted felons, such as Mr. LaRouche. Therefore, based on the application of the Matching Payment Act, the Commission's regulations and the case law to the unique facts of this situation, the Commission made an initial determination pursuant to 11 C.F.R. § 9033.10(b) that Mr. LaRouche be denied eligibility to receive Federal matching funds for the 1992 election cycle.

The statement of legal and factual reasons for the Commission's initial determination was provided to Mr. LaRouche in accordance with 11 C.F.R. § 9033.10(b) on

January 2, 1992. *See* Attachment 13. The Committee submitted its response to the Commission's initial determination pursuant to 11 C.F.R. §§ 9033.10(b) and 9034.4(b) on January 22, 1992. *See* Attachment 14. On January 30, 1992, the Committee submitted a letter which requested that the Commission make a final determination no later than February 13, 1992. *See* Attachment 15. On February 5, 1992, the Commission sent a letter to the Committee requesting additional information. The Committee was also informed that it would be unlikely that this matter would be completed by February 13, 1992. *See* Attachments 16 and 17. The Committee filed a supplemental response on February 5, 1992. *See* Attachment 18. The Committee responded to the request for additional information on February 7, 1992. *See* Attachment 19. On February 18, 1992, the Office of General Counsel informed the Committee that the Commission would make a final determination on February 27, 1992. The Committee confirmed its understanding of this arrangement in a letter dated February 19, 1992. Attachment 20. The letter also stated that the Committee would file a writ for mandamus on February 27, 1992, in the event that the Commission did not make a final determination on that day.

IV. COMMITTEE'S RESPONSE

The Committee essentially makes four major arguments in support of its contention that Mr. LaRouche is eligible to receive Federal matching funds for the 1992 election cycle: (1) the Commission lacks the authority to deny eligibility based on alleged "past actions" of the candidate and relies on 11 C.F.R. § 9033.4(b) in error and in bad faith; (2) even if section § 9033.4(b) were valid, there are no relevant past actions or irregularities in the 1992 submission to bar Mr. LaRouche's eligibility; (3) state laws do not bar

Lyndon LaRouche from seeking and obtaining the Democratic presidential nomination; and (4) the Commission's initial determination is a political motivated violation of both the FECA and the United States Constitution and is causing Mr. LaRouche irreparable harm.

The Committee asserts that Mr. LaRouche, having met the statutory requirements for eligibility, cannot be denied matching funds. To support its assertion, the Committee states that the Commission's determination relies on a single regulation, 11 C.F.R. § 9033.4(b), which has never before been activated. The Committee contends that the regulation is, on its face, unconstitutionally vague, and cannot be applied in an objective and impartial fashion. *See* Attachment 14, pages 7-9. The Committee argues further that the regulation itself was based in part on an erroneous interpretation of certain court cases. *Id.* at 29. Far from sustaining the arguments asserted, the Committee argues that these cases refute it and grant the Commission the authority to conduct a limited and closely circumscribed investigation of the threshold submission, where the threshold submission contains irregularities suggesting that the candidate has not met the objective statutory requirements. The Committee asserts that the Commission has already pronounced this interpretation of the regulation to be invalid, both by its granting of matching funds to Mr. LaRouche in 1988, and by explicit statement in its most recent *Annual Report*. *Id.* at 11.

The Committee states further that even if the regulation passes constitutional muster, the regulation is inapplicable to Mr. LaRouche's 1992 threshold submission. According to the Committee, in order to rely on this regulation for the delay or denial of certification, the Commission must find that "irregularities" demonstrated to have occurred in previous election cycles are recurring in the new submis-

sion. The Committee maintains that there are no such irregularities in Mr. LaRouche's 1992 submission, thus, the regulation does not apply. *See* Attachment 14, pages 9-10. Furthermore, the Committee contends that even if the Commission did have authority to delay or deny matching funds based on the candidate's past actions in prior publicly funded campaigns, there are no such relevant past actions by Mr. LaRouche or his committees. The Committee asserts that the past actions alleged are either irrelevant, trivial, or did not occur at all. *See* Attachment 14, pages 14-19. The Committee continues to state that "[n]ot only was Mr. LaRouche not convicted of anything having to do with electoral campaigns, he also was not 'convicted [or indicted] of defrauding another Federal agency, the Internal Revenue Service'." Attachment 14, page 15.

In addition, the Committee asserts that if the Commission uses a "past actions" analysis in this instance, it must also use such an analysis for other 1988 and 1992 candidates. *Id.* at 21. The Committee maintains that if the arguments adopted to deny Mr. LaRouche matching funds are allowed to stand, the Commission will have to rescind the certifications already made of several other 1992 candidates, and demand that Federal funds granted to several other candidates in 1988 be repaid. The Committee also attempts to demonstrate that the Commission is attempting to rank the magnitude of various violations and lists the "gamut" of violations incurred by other publicly funded candidates (*i.e.*, Mondale, Glenn, Bush, Simon, etc.). *Id.* at 22-24. In essence, the Committee believes that it is being held to a different, more stringent, standard than the other major candidates by the Commission's application of the law.

The Committee also contends that the argument that Mr. LaRouche is not a "legally viable" candidate is both legally and factually false. *Id.* at 37. The Committee argues that state laws cannot pre-empt the United States

Constitution in so fundamental a matter as the qualifications for Federal office. The Committee's response notes that Mr. LaRouche is currently on the ballot in five of the 36 states which initially excluded him.

Finally, the Committee asserts that the Commission and the Office of General Counsel acted in bad faith in reaching the initial determination to deny Mr. LaRouche Federal matching funds. To bolster its argument that the Commission acted in "bad faith," the Committee addresses: (1) the 1982 conciliation agreement in MUR 1352; (2) compares the treatment of Mr. LaRouche to Walter Mondale; (3) compares the treatment of Mr. LaRouche to the Anti-Defamation League ("ADL"); and (4) the treatment of the 1992 submission. *See* Attachment 14, pages 42-66.

V. LEGAL ANALYSIS

A. The Commission has the Authority to Consider Mr. LaRouche's Past Actions in Evaluating his Current Submission

The Committee's first contention that the Commission lacks authority to deny eligibility based on the past actions of the candidate misconstrues the Commission's regulations and the applicable law. The Committee's insistence that the applicability of section 9033.4(b) only arises when there are patent irregularities on the face of a submission is misguided. Section 9033.4(b) and the Explanation and Justification were drafted to provide alternative bases for denying a candidate's application for matching funds: (1) a candidate's repudiation of an earlier candidate agreement in which he or she promised to pay any necessary repayments and civil penalties; or (2) the appearance of patent irregularities suggesting the possibility of fraud in earlier matching fund submissions that seem to be recurring in the new request. *See* 11 C.F.R. § 9033.4(b). *See*

also 52 *Fed. Reg.* 20864, 20868-69 (June 3, 1987). The Explanation and Justification states that these are examples of factors the Commission may consider, but the rule in no way requires that the submission must have patent irregularities on its face to deny eligibility or pursue a further investigation.

The Committee also fails to give a complete reading to 11 C.F.R. § 9039.3(a)(3), which provides that matching payments will not be withheld pending the results of an inquiry unless the Commission finds patent irregularities suggesting the possibility of fraud in materials submitted by or in the activities of the candidate or his or her authorized committees. 11 C.F.R. § 9039.3(a)(3). Like section 9033.4(b), section 9039.3(a)(3) lists the existence of "patent irregularities" in the submission as one of the factors that justify an additional investigation. However, the provision also states, in the alternative, that the activities of the candidate or his or her authorized committee(s) may also be examined when making such a determination.

Moreover, the Commission is not required to ignore behavior which convinces it that promises made to secure eligibility to receive public financing are not made in good faith. The courts have recognized the Commission's obligation to go beyond the face of a candidate's letter of agreements and certifications when it becomes necessary. In *Committee to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834 (D.C. Cir. 1979), the court was asked to rule on whether the Commission abused its discretion in denying Mr. LaRouche's eligibility to receive matching funds for the 1976 presidential primaries. The court examined the candidate's threshold submission as well as other evidence the Commission obtained during its threshold audit. The court decided that the Commission had not abused its discretion, and went on to state that:

> The policy underlying section 9036(a), which is to provide prompt payments to eligible candidates, is served by limiting the role of the Commission during the certification process to reviewing the face of a candidate's threshold submission except where that submission (or that submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud.

LaRouche Committee, 613 F.2d at 843. The court qualified its limitation by noting that the Commission is not "powerless to protect the fisc in the unlikely event that a fraudulent submission is not evident on its face." *Id.* n.17. The court did not foreclose the possibility that the Commission could look to other factors beyond the face of the threshold submission in determining a candidate's eligibility to receive matching funds.

Similarly, in 1981, the court addressed a question of pre-certification investigation in *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C. Cir. 1980). In that case, the court found that although the Commission may not withhold funding from a candidate who has satisfied the objective criteria for eligibility, the law does not prevent the Commission from investigating a committee "if it reasonably appears that a patent fraud or other major violation of the law is being committed." *Carter-Mondale*, 642 F.2d at 544.

The concurring opinion stated that the Commission not only has the ability, but has the obligation to look beyond the candidate's letter of agreements and certifications and threshold submission in certain situations. *Carter-Mondale*, 642 F.2d at 548 (Wald, J., concurring). The concurrence noted that the Commission has a duty to conduct a limited investigation of extrinsic material where

overt acts by the candidate indicate an intention to defy the eligibility requirements for public funding:

> If there were no circumstances under which a pre-certification investigation were permissible the public could conceivably witness the spectacle of millions of taxpayer dollars being channeled to a candidate who had, before certification, either flouted the eligibility requirements or stated his intention to defy the restrictions imposed by the Fund Act on publicly financed candidates. No reasonable interpretation of the Fund Act requires the statement of such a rule. . . .

Id. The concurrence also noted that the Commission could and should consider a candidate's past actions in its eligibility determination under certain circumstances. *Id.* at 549. Judge Wald added that a decision to certify without first investigating could be overturned in court if the materials available to the Commission present a clear case of fraudulent intent. *Id.* at 551. Therefore, the Commission should not "deliberately blind itself to materials available to the agency which address the candidate's eligibility for public funding." *Id.* at 550.

The Commission's authority to look beyond the face of a submission was a factor in the case of *LaRouche v. State Board of Elections,* 758 F.2d 998 (4th Cir. 1985). In that case, the United States Court of Appeals upheld a decision of the North Carolina State Board of Elections refusing to place Mr. LaRouche's name on the ballot in that state. The Board based its refusal upon the Commission's initial determination of ineligibility for Mr. LaRouche. The court found, in relevant part, that "the FEC legitimately concluded that LaRouche's § 9033(a)(3) agreement for the 1984 presidential election was inadequate" due to his

failure to honor his 1980 candidate agreements. *LaRouche*, 758 F.2d at 1000.

The courts recognition of the Commission's authority to consider past actions is consistent with other cases which also suggest that "past violations may in certain circumstances justify an inference that a defendant will violate the law in the future." *FEC v. Weinstein*, 462 F. Supp. 243, 252 (S.D.N.Y. 1978). *See also SEC v. Savoy Industries*, 587 F.2d 1149, 1168 (D.C. Cir. 1978) *cert. denied*, 440 U.S. 913 (1979) ("[defendant's] past conduct is highly suggestive of his propensity to commit securities law violations and the likelihood that he will commit securities law violations in the future. [Citation omitted]. His violation was not an isolated incident; he has not demonstrated that he understands his conduct to have been wrongful; and he does not give sufficient assurance against future violations.")[3] In addition, the suspension of eligibility on the basis of suspected fraud is used by other Federal agencies that dispense public funds. In fact, the courts have previously reviewed and approved determinations by Federal agencies terminating payments on the basis of suspected fraud, even in the absence of specific power to do so. *See Rush v. Smith*, 573 F.2d 110, 115 (2d Cir. 1978). *See also* Office of Management and Budget Guidelines for Nonprocurement, Debarment, and Suspen-

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[3] An inference of a fraudulent lack of intent to carry out a promise may be based upon identical promises previously made to others which were not carried out. *Vance Pearson, Inc. v. Alexander*, 408 N.E.2d 782, 785 (Ill. Ct. App. 1980) ("[t]he other two transactions showed defendant making promises to make installations which he did not, and apparently could not, keep. The *modus operandi* there was common to that here. Evidence of the two transactions also showed defendant's likely intent here. . . .")

sion, 52 *Fed. Reg.* 20360 (May 29, 1987).[4]

Contrary to the Committee's arguments, the Commission has the explicit authority to make rules and regulations governing the Matching Payment Act. *See* 26 U.S.C. § 9039(b). *See also* 2 U.S.C. § 437c(b). Moreover, the Commission's authority in this area, and its interpretation of its own regulations, is given significant deference. *See FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981); *Environmental Defense Fund v. Costly,* 657 F.2d 275 (D.C. Cir. 1981); *Committee to Elect LaRouche v. FEC,* 613 F.2d 834 (D.C. Cir. 1979). The Committee has failed to demonstrate that the Commission's interpretation and application of 11 C.F.R. § 9033.4(b) is contrary to the Matching Payment Act.[5]

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[4] Recidivist sentencing statutes impose longer prison terms on defendants found to be habitual offenders at least in part because of the perceived greater likelihood that the individual will commit crimes again upon release, and the consequent desire to protect society by incarcerating them for longer periods. *See e.g.* 18 U.S.C. § 3575; *United States v. Warme,* 572 F.2d 57, 61-2 (2d Cir.), *cert. denied,* 435 U.S. 1011 (1978) ("[a] defendant may be found dangerous simply because the evidence shows he has no regard for the law and the rights of the public.")

[5] It is a well established principle of administrative law that it is within the powers of an administrative agency to formulate policy and make rules to fill any ambiguities left by Congress. *Chevron, USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984). The Commission has promulgated regulations at 11 C.F.R. Part 9033 and issued the *Guideline* to administer the Matching Payment Act. In the absence of evidence that these procedures are contrary to the Matching Payment Act, the Commission should be entitled to due deference. *FEC v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 37 (1981) ("[t]he Commission is precisely the type of agency to which deference should be afforded.") *See also FEC v. Ted Haley Congressional Committee,* 852 F.2d 1111, 1114 (9th Cir. 1988) ("[t]he

B. Mr. LaRouche's Past Fraudulent Fundraising Practices and Non Compliance with the FECA and the Matching Payment Act are Relevant to the Commission's Consideration of his Current Application

In reviewing Mr. LaRouche's current application, the Commission must consider his past actions. As the following discussion demonstrates, in addition to his criminal conviction, Mr. LaRouche has a long history of non-compliance with the FECA and the Matching Payment Act. Mr. LaRouche conducted campaigns for nomination as a presidential candidate in 1976, 1980, 1984, and 1988 and Mr. LaRouche's past campaigns have resulted in numerous enforcement investigations and lawsuits. In fact, all of Mr. LaRouche's various campaigns have demonstrated similar patterns of non-compliance, and in some instances fraud, and are consistent with the fraudulent fundraising practices that were the subject of his criminal conviction.

1. 1976 and 1980 Presidential Cycles

In the 1976 election cycle, the Commission, based on a threshold audit, discovered that LaRouche's threshold submission contained contributions made by money order or cashier's check that were attributed to individuals in various states, but drawn from one bank on the same dates. The Commission also discovered a pattern of heavy last-minute contributions from persons listing their occupation as "volunteer coordinator" for an organization named the National Caucus of Labor Committees ("NCLC"). That organization, the audit revealed, shared

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interpretation of statutes and regulations by an agency charged with their administration is entitled to due deference and should be accepted unless demonstrably irrational or clearly contrary to the plain meaning.")

office space and staff with Mr. LaRouche's 1976 principal campaign committee, the Committee to Elect LaRouche ("CTEL"), and received payments of more than $310,000 from the Committee during the last two weeks of Mr. LaRouche's eligibility period. *See Committee to Elect LaRouche v. FEC*, 613 F.2d 834 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

On the basis of these findings, the Commission, on December 29, 1976, authorized an expanded investigation in which the Audit staff conducted field interviews of contributors to CTEL to determine whether the persons named as contributors in the Committee's threshold submission actually intended to contribute to Mr. LaRouche's campaign.[6] Upon reviewing the results of the field interviews and other documentation submitted by CTEL, the Commission determined that Mr. LaRouche was ineligible to receive Federal matching fund payments for the 1976 election cycle. The basis for the Commission's decision was the fact that the threshold submission did not include sufficient verifiable contributions. CTEL appealed the Commission's determination, and the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision.[7] *See Committee to Elect*

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[6] The field interviews began on January 26, 1977. On April 28, 1977, CTEL and ten individuals filed an action in the United States District Court for the District of Columbia to enjoin the threshold audit and investigation. *See Jones v. Unknown Agents of the FEC*, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). After receiving notice of the Commission's field interviews, CTEL submitted additional documentation in an effort to establish eligibility on February 2, 1977.

[7] The Commission initiated several Matters Under Review as a result of Mr. LaRouche's 1976 submission and the Commission's investigation. First, MUR 368 involved violations of 2 U.S.C. § 441f (contributions in the name of another) and of 26 U.S.C. § 9042(c)

LaRouche, 613 F.2d 834 (D.C. Cir. 1979). As a result, Mr. LaRouche did not receive public funding for the 1976 election cycle.

On December 18, 1979, the Commission determined that Mr. LaRouche was eligible to receive matching funds for the 1980 election cycle on the basis of his letter of candidate agreements and certifications and threshold submission of November 29, 1979. As a part of that application, Mr. LaRouche certified that he would comply with the conditions of eligibility set forth in the Commission's regulations, that he would make any repayments due under 26 U.S.C. § 9038, and that "Citizens for LaRouche and/or I shall pay any civil penalties including [sic] in a conciliation agreement or imposed under 2 U.S.C. section 437g against me, the committee, or any authorized committee of mine."

During the routine audit of Mr. LaRouche's 1980 campaign committee, Citizens for LaRouche ("CFL"), the Commission found evidence of numerous violations of FECA and the Matching Payment Act. These violations included knowing and willful submission of false or misleading contribution information in order to obtain matching funds, knowing acceptance of contributions in

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(fraudulent information in submissions to the Commission). Second, MUR 398 involved corporate contributions by organizations related to CTEL made in violation of 2 U.S.C. § 441b, violation of the registration requirement for affiliated organizations, and false statements in committee reports submitted to the Commission. All of the MURs arising from the 1976 cycle were merged by the Commission into MUR 1352, which arose out of the 1980 campaign cycle. On November 5, 1982, the Commission accepted a signed conciliation agreement from Citizens for LaRouche (Mr. LaRouche's 1980 campaign committee) and closed MUR 1352. *See FEC v. Citizens for LaRouche, et al.*, No. 83-373 (D.D.C. Sept. 17, 1984). *See also* MURs 1158, 1186, and 1253.

the name of another, and knowing acceptance of numerous excessive contributions. Specifically, the Commission discovered that CFL had submitted money orders from various individuals who had no intention of contributing to Mr. LaRouche's campaign. On November 5, 1982, CFL entered into a conciliation agreement with the Commission in which it admitted 79 violations, many of which were knowing and willful, and agreed to pay a $15,000 civil penalty in installments. *See* Matters Under Review ("MURs") 1158, 1186, 1253, and 1352.

When CFL failed to make any installment payments, and refused to answer the Commission's written requests for payments, the Commission filed suit on February 9, 1983, to enforce the conciliation agreement against CFL and Mr. LaRouche. *FEC v. Citizens for LaRouche, et al.*, No. 83-373, 2 Fed. Election Camp. Fin. Guide (CCH) 9214 (D.D.C. Sept. 17, 1984). The inclusion of Mr. LaRouche in the lawsuit was based upon his candidate agreement submitted in 1979. In his answer to the Commission's lawsuit, Mr. LaRouche repudiated his 1979 candidate agreement by stating that the letter "binds him to an agreement to which he was not a party," and that he was not personally liable for the civil penalty determined to be due from the Committee. Mr. LaRouche, in effect, argued that his insertion of "and/or" in his 1979 candidate letter insulated him from personal liability for any civil penalty assessed against his principal campaign committee. The Commission's position was that Mr. LaRouche's letter of candidate agreements and certifications made him and CFL jointly and severally liable for civil penalties and repayments, and that his use of "and/or" rather than "and" in his letter was of no effect. *Id.* The court subsequently found that Mr. LaRouche was liable for the unpaid civil penalty, citing the letter of candidate agreements

that he had entered into with the Commission as a condition of his eligibility to receive Federal matching funds.[8]

2. 1984 Presidential Cycle

Mr. LaRouche's application to receive matching funds for his 1984 primary campaign was submitted while litigation on the repayment and unpaid civil penalty was still pending. On January 26, 1984, the Commission made an initial determination that Mr. LaRouche had failed to meet the requirements for eligibility to receive matching payments for the 1984 election cycle. The Commission concluded that the 1983 letter of candidate agreements and certifications, in which he promised to make repayments and pay civil penalties, was not sufficient proof of his acceptance of responsibility under the circumstances. The Commission found that Mr. LaRouche's "attempt to induce the Commission to certify him to receive public funds, on the basis of promises which he has demonstrated he has no intention to fulfill, constitutes a fraudulent submission." Memorandum to the Commission, dated January 13, 1984 (Agenda Document #84-12).[9]

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[8] In *Dolbeare v. FEC*, No. 81 Civ. 4468-CLB (S.D.N.Y. March 9, 1982), CFL requested that the district court enjoin the FEC from continuing its investigation and audit concerning Mr. LaRouche's 1980 campaign. The district court did not enjoin the investigations as requested, but did issue a preliminary injunction which, *inter alia*, forbade the Commission from opening any new investigations regarding CFL (the 1980 Committee) until the pending investigations were completed. On November 5, 1982, CFL entered into a conciliation agreement settling the outstanding MURs which were the subject of the litigation – expressly admitting to have committed 79 violations of the FECA. On November 9, 1982, CFL stipulated to the dismissal of its district court case.

[9] On January 27, 1984, the campaign treasurer and The LaRouche Campaign ("TLC") filed suit against the Commission for review of its

On March 6, 1984, Mr. LaRouche's 1980 Committee, Citizens for LaRouche, paid the civil penalty of $15,000 as contained in the conciliation agreement reached in connection with violations of FECA during the 1980 campaign. The Commission's lawsuit to compel the Committee to adhere to the conciliation agreement went forward and the district court ultimately ruled in the Commission's favor. *FEC v. Citizens For LaRouche, et al.*, No. 83-373, 2 Fed. Election Camp. Fin. Guide (CCH) 9214 (D.D.C. Sept. 17, 1984).

On March 29, 1984, the Commission failed by a vote of 2-3 to determine that Mr. LaRouche was ineligible to receive matching fund payments; but it also failed by a vote of 3-2 to determine him eligible. Instead, the Commission decided by a vote of 5-0 to:

> determine Mr. LaRouche eligible contingent upon the Commission's receipt of the outstanding balance on Mr. LaRouche's repayment and the receipt of an affidavit signed by Mr. LaRouche that he is bound by the terms of his 1979 agreements, specifically with respect to his liability under the conciliation agreement negotiated by his 1980 campaign committee. If the outstanding balance is paid and Mr. LaRouche finally and without qualification accepts his personal responsibilities, the Commission would consider the audit recommendation on his threshold eligibility for the 1984 matching payment program.

Certification, dated March 29, 1984 (Agenda Document #84-50-E).

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initial determination. The court dismissed the case for lack of subject matter jurisdiction, holding that the court of appeals can review only final determinations by the Commission. *Spannaus v. FEC*, No. 84-1030 (D.C. Cir. *dismissed*, April 4, 1984).

On April 5, 1984, however, the Commission decided to reconsider its previous determination of contingent eligibility. The Commission also decided to delay further consideration of Mr. LaRouche's threshold eligibility until the Commission received the outstanding balance on the 1980 repayment and the requested affidavit. On April 12, 1984, after receipt of the balance of the 1980 repayment and a signed affidavit, the Commission certified Mr. LaRouche to be eligible to receive matching funds for 1984.

On May 17, 1984, the Commission determined Mr. LaRouche's date of ineligibility to be June 7, 1984, pursuant to 26 U.S.C. § 9033(c)(1)(B). Mr. LaRouche received less than 10% of the vote in the Democratic Presidential primary elections in Louisiana on May 5, 1984, and in Maryland and Ohio on May 8, 1984. Therefore, the Commission determined his date of ineligibility to be 30 days after the date of the second consecutive unsuccessful primary.

The Commission conducted an audit of Mr. LaRouche's 1984 principal campaign committee, The LaRouche Campaign, pursuant to 26 U.S.C. § 9038. Preliminary results of this audit were set forth in the Interim Audit Report issued on November 14, 1984. The Interim Audit Report noted a substantial number of credit card contributions made just prior to Mr. LaRouche's date of ineligibility. The number and timing of these contributions prompted the Audit Division to question their validity. The Commission had seen similar contribution patterns during the audits of the 1976 and 1980 LaRouche Committees. In both previous elections, many of these contributions proved to be improperly attributed to individuals who had no intention of contributing to Mr. LaRouche's campaigns. Moreover, during the audit of the 1984 campaign,

the Audit staff found that $35,000 of the contributions collected were withdrawn from the Committee's account because the credit cardholders denied having authorized the contribution.

As detailed in *Spannaus v. FEC,* 641 F. Supp. 1520 (S.D.N.Y. 1986), *aff'd,* 816 F.2d 670 (2d Cir. 1987), the Commission had evidence of other fundraising irregularities alleged to have occurred during Mr. LaRouche's 1984 campaign. It was alleged, for example, that the TLC made unauthorized charges on the credit card accounts of persons who had not intended to contribute to the campaign. There was also evidence that some contributors had used their credit cards for subscriptions to *Fusion* magazine, but TLC allegedly made additional unauthorized charges on their accounts for use in the campaign. In other instances, it was alleged that TLC increased the amount of the card contribution. Further allegations raised were that contributors made loans to TLC in excess of $1,000 through other groups such as the Executive Intelligence Review and Campaigner Publications, and the loans were never repaid.

When the Commission attempted to obtain documents from TLC regarding its 1984 fundraising activities, TLC refused to comply. TLC argued that other organizations that conducted the solicitations for Mr. LaRouche's 1984 campaign performed its recordkeeping responsibilities and that it had no access to these records. Specifically, Caucus Distributors, Inc. was used to conduct all the solicitations for the 1984 campaign. When the Commission requested certain solicitation materials, TLC stated that the materials were not in its possession and Caucus refused to release the materials. The Commission, on December 11, 1984, authorized the issuance of a subpoena and order to TLC and its treasurer, Mr. Spannaus.

After TLC and the treasurer refused to comply, the Commission filed a petition to enforce the subpoena against TLC on May 21, 1985. The court issued a final order for TLC to comply with a modified version of the subpoena on August 26, 1986. *FEC v. The LaRouche Campaign*, 644 F. Supp. 120 (S.D.N.Y. 1986), *modified*, 817 F.2d 233 (2d Cir. 1987). TLC, however, still refused to comply with the subpoena, asserting that Caucus Distributors, Inc. would not provide the documents. Following a raid by the FBI on its headquarters on October 6, 1986, TLC stated that it could not comply with the subpoena because the requested documents had been seized. In any event, the Commission approved the Final Audit Report on October 17, 1985.

3. 1988 Election Cycle

On November 18, 1987, Lyndon H. LaRouche, Jr. and the LaRouche Democratic Campaign ("1988 Committee") submitted a letter of candidate agreements and certifications, with a threshold submission, seeking eligibility to receive Federal matching funds for the 1988 election cycle. Due to problems that existed on the face of the submission and his historical pattern of non-compliance and fraud, the Office of General Counsel submitted a memorandum on December 24, 1987, recommending that the Commission make an initial determination that Lyndon LaRouche failed to establish his eligibility to receive matching funds for the 1988 presidential election cycle. The memorandum stated that the Commission should not determine Mr. LaRouche eligible to receive matching funds unless it received certain assurances in the form of affidavits from the candidate and treasurer. The memorandum further suggested that the Commission not make a final determination regarding Mr. LaRouche's eligibility until the

Audit Division had conducted a review to confirm that each contribution submitted for matching in the threshold submission was intended as a contribution to the LaRouche 1988 campaign.

On January 6, 1988, the Commission received from the LaRouche Democratic Campaign a request to delay consideration of this matter in order to allow committee representatives to meet with Commission staff. The Commission approved this request on January 6, 1987. Subsequently, Commission staff and representatives of the 1988 Committee met on several occasions to discuss the concerns raised with respect to Mr. LaRouche's application for matching funds. An agreement was drafted as a result of these meetings.

Under the agreement, the Commission would conduct a contribution verification review of approximately 1,000 checks included in Mr. LaRouche's threshold submission which were made payable to "LDC," contained the notation "AIDS," or appeared to have altered payees. The confirmation process consisted of sending letters from the Commission to the various contributors requesting that they complete the enclosed questionnaire regarding their intent to contribute to Mr. LaRouche's 1988 campaign and return it to the Commission. A letter from the LaRouche Democratic Campaign was also sent to contributors. Only those contributions for which a positive response was received would be matched. The 1988 Committee was allowed to submit additional contributions upon two prearranged dates in order to establish Mr. LaRouche's eligibility if the threshold requirements were not satisfied by the positive responses submitted to the Commission during the review.

The LaRouche Democratic Campaign also agreed to submit affidavits to address other concerns expressed in

the December 24, 1987 memorandum prepared by the Office of General Counsel. Specifically, committee representatives agreed to submit an affidavit from its treasurer that would fully explain the qualifications included in its reports. In addition, the candidate and treasurer would submit affidavits agreeing to accept personal responsibility for possession, maintenance, and delivery of requested and required records to the Commission. The agreement also provided that the Office of General Counsel and the Audit Division would make favorable recommendations of eligibility if: (1) the LaRouche Democratic Campaign fulfilled the other provisions of the agreement; and (2) the confirmation process did not reveal patent irregularities suggesting the possibility of fraud in the threshold submission.

The Commission approved the agreement on January 28, 1988, which authorized the Audit Division and the Office of General Counsel to perform a review of the contributions pursuant to 26 U.S.C. § 9039 and 11 C.F.R. §§ 9039.2 and 9039.3. Pursuant to that review, 713 of the 1,062 contributors contacted (67%) responded to the confirmation survey. The review further revealed that 43 or 6% of those individuals responding indicated that they had not intended to contribute to the LaRouche Democratic Campaign. The review also indicated that some of the contributions were made as loans to the LaRouche Democratic Campaign. These contributions were deemed to be non-matchable.

Based upon a review of the confirmation results, it was concluded that the patent irregularities indicated by the survey results did not justify an unfavorable Eligibility Report. Therefore, the Audit staff prepared a report for Commission consideration recommending eligibility for Mr. LaRouche subject to certain conditions, and con-

tingent upon the satisfactory submission by the Committee of additional contributions needed to reach the threshold level. The LaRouche Democratic Campaign subsequently submitted the necessary affidavits and matchable contributions to the Commission. The Commission certified the LaRouche Democratic Campaign eligible to receive matching funds on March 24, 1988.[10]

4. Criminal Convictions and Other Investigations

Mr. LaRouche's fraudulent fundraising practices have also been the subject of several Federal and state grand jury investigations. For example, on October 14, 1988, a Federal grand jury in the Eastern District of Virginia handed down a thirteen count indictment against Lyndon H. LaRouche, Jr., Edward Spannaus, treasurer of Mr. LaRouche's campaign committee, and five other individuals associated with Mr. LaRouche. The indictment focused on the fundraising practices employed by Mr. LaRouche and his associates, alleging that they employed fraudulent schemes to induce individuals to contribute or loan money to his organizations, including his 1984 campaign committees, The LaRouche Campaign and Independent Democratics for LaRouche.

At trial, the government sought to prove that the seven defendants, acting through the National Caucus of Labor Committees ("NCLC"), fraudulently solicited loans from contributors. The government alleged that: (1) the defendants promised to repay borrowed funds at specific times and at stated interest rates when they, in fact, knew that the loans would not be repaid; and (2) the defendants

[10] On May 17, 1990, the Commission made an initial repayment determination that the LaRouche Democratic Campaign must repay $154,894.13 to the United States Treasury. *See* Final Audit Report on the LaRouche Democratic Campaign (1988), Approved May 17, 1990.

promised that the lenders that the funds would be used for specific purposes, when, in fact, the funds were never intended to be used in such a manner.[11] The government further alleged that these schemes resulted in a total of $4.3 million in loans to Mr. LaRouche's campaign committees in 1984. The government also alleged that by 1986, Mr. LaRouche's non-campaign debts rose to $30 million. On December 16, 1988, the jury found the seven defendants guilty on all the counts with which they had been charged: (1) conspiracy to commit mail fraud (all defendants); (2) mail fraud (all defendants, various counts); and (3) conspiracy to defraud the Internal Revenue Service (Mr. LaRouche only). The convictions and sentences were subsequently appealed and upheld. *See U.S. v. Lyndon H. LaRouche, Jr., et al.,* No. 89-5518 (4th Cir. Jan. 22, 1990). Mr. LaRouche is currently serving a 15 year sentence in Federal prison for the aforementioned crimes.

Contrary to the Committee's assertions, Mr. LaRouche's 1988 conviction involved the fundraising practices employed in his 1984 presidential campaign. Although Mr. LaRouche was not convicted of specific criminal violations of the FECA or other election laws, he was convicted of employing fraudulent schemes to fund his various organizations, including his 1984 presidential campaign committees. The indictment, testimony at trial,

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[11] The indictment also charged that Mr. LaRouche conspired to defraud the Internal Revenue Service. The indictment alleged that the LaRouche organization compensated Mr. LaRouche by maintaining his lifestyle, including the costs of his housing, food, furniture, and clothing, rather than paying him a salary. In addition, a number of affirmative steps were taken by Mr. LaRouche and his associates to conceal some of the payments and to characterize others as gifts. Moreover, Mr. LaRouche did not file income tax returns for the years 1980, 1981, and 1982.

the jury instructions, and the appeal, all demonstrate that Mr. LaRouche's conviction for mail fraud and conspiracy to commit mail fraud included the methods employed by his 1984 presidential campaign committees to raise funds.

More specifically, the indictment explicitly includes the fundraising activities of Mr. LaRouche's 1984 presidential campaign committees, including TLC. *See* Virginia Federal Indictment, *U.S. v. Lyndon H. LaRouche, Jr., et al.*, Crim. No. 88-243-A (E.D. Va. Jan. 27, 1989). Attachment 7. Paragraph 7 of the section addressing the organizations involved in the fraudulent fundraising practices states that:

> Although the monies raised by these entities were largely kept separate from those raised by the entities referred to in paragraph 6 above, the *campaign committees* otherwise operated in the same manner as those entities and were established, staffed and managed by NCLC members. LaRouche exercised ultimate control over the *campaign committees* and his directives were enforced by NEC and NC members. Fundraising was controlled and carried out by the same persons involved in fundraising for the non-campaign entities.

Attachment 7, pages 5-6 [emphasis added]. In fact, the fundraising activities of Mr. LaRouche's campaign committees were specifically included in several paragraphs throughout the indictment, including the sections addressing: (1) the Organization (paragraph 7); (2) the Fundraising Operation (paragraphs 9 and 12); (3) the Means and Methods of the Conspiracy (paragraphs 25 and 27); and (4) Overt Acts (paragraphs 20, 21, 22, 23, 34, 35, and 67).

The indictment also alleged that the fundraisers assured individuals who made loans to the campaign committees

that the money would be repaid out of Federal matching funds. However, the fundraisers neglected to inform the individuals that loans of that nature were not eligible for matching. *See* Attachment 7, pages 13-16. Thus, the fundraising practices of TLC were specifically included in the indictment and were used as evidence of an overall, organization-wide, conspiracy to defraud.

Testimony at trial illustrated the extent to which the fundraising practices of Mr. LaRouche's campaign committees were intertwined with Mr. LaRouche's other organizations. For example, Ms. Elizabeth Sexton testified that she made loans to TLC and IDL. However, she stated that, "[i]t was not explained to me that these were political contributions." *See* Virginia Federal Transcript, *U.S. v. Lyndon H. LaRouche, Jr., et al.,* Crim. No. 88-243-A, vol. II, p. 16 (E.D. Va. Nov. 22, 1988). Attachment 21. Ms. Sexton stated further that she considered the checks loans, not contributions to Mr. LaRouche's political committees. Transcript at 16. Ms. Sexton also testified that the checks were altered by the committees. *Id.* at 15, 20-21.

In addition, a former fundraiser for Mr. LaRouche, Mr. Christian A. Curtis, testified as to the various fundraising tactics employed by Mr. LaRouche's organizations, including the campaign committees. *See* Virginia Federal Transcript, *U.S. v. Lyndon H. LaRouche, Jr., et al.,* Crim. No. 88-243-A, vols. III-IV (E.D. Va. Nov. 1988). Mr. Richard Welsh, the assistant treasurer for TLC, also testified about the fundraising structure of TLC and the repayment policies of the political committees.[12] *Id.* at vols. V-VI.

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[12] The government also introduced several exhibits into evidence that addressed the fundraising methods and repayment policies of the campaign committees (*i.e.*, 8-A, 8-B, 8-C, 8-D, 8-E, 8-F, 8-G, 8-H, 8-I, 8-J, 8-K, 8-L, 8-M, 8-N, 8-O, 15-A, 15-B, 15-C, 15-D, 15-E, 15-F, 15-G, 15-H, 15-I, 15-M, 15-R, and 15-T).

Moreover, the court did not separate out the campaign committee's activities from those of LaRouche's other organizations. In fact, when counsel offered motions concerning the instructions to be given to the jury, counsel for the defense (Mr. LaRouche, *et al.*) argued that the evidence presented relating to the fundraising practices of the political committees (*i.e.*, TLC) should be excluded. The government, on the other hand, argued that the evidence was relevant to the charges and that it should not be excluded. The government stated in support of its motion that:

> the allegation of the mail fraud charge incorporates by reference the conspiracy charge, including the portions of the conspiracy charge that specifically refer to *campaign fundraising*. It's all one scheme as far as we are concerned, Your Honor. It's the same fundraisers. It's the same executive members of the organization overseeing it. I don't see that there is any way that we can create artificial divisions at this point.

See Attachment 8, page 15 [emphasis added]. Judge Bryan sustained the government's motion. *Id.* Moreover, in accordance with the government's request, Judge Bryan gave no limiting instructions to the jury regarding the activity of campaign committees. There was no instruction given at trial which directed the jury to disregard the evidence presented relating to the political committee's fundraising practices.

Although there was no written opinion from the trial court stating the basis for Mr. LaRouche's conviction, it is quite apparent that the fundraising practices of Mr. LaRouche's campaign committees were included as evidence of an organization-wide scheme to defraud. There was no attempt by the defendants at trial to differentiate between the fundraising methods used by the campaign

committees from those used by Mr. LaRouche's other organizations. Furthermore, the only TLC related issue raised on appeal addressed the sufficiency of evidence underlying the conviction of Mr. Spannaus, the TLC treasurer. The appeal specifically stated that there was sufficient evidence presented at trial to support Mr. Spannaus' conviction. To support its position, the court cited the letters sent to campaign contributors by Mr. Spannaus.[13] The court also stated that sufficient evidence supported the jury's conclusion that Mr. LaRouche participated in the organization's fraudulent fundraising practices. *See* Attachment 12, page 17. The language included in the appeal demonstrates that the campaign related activities helped to form the basis of the conviction. Thus, the Committee's assertion that Mr. LaRouche's conviction had nothing to do with the fundraising methods employed by his campaign committees is false.

In addition to the Virginia conviction, Mr. LaRouche was the focus of various other grand jury investigations in connection with the fundraising practices utilized in his

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[13] The court in *U.S. v. Lyndon H. LaRouche, Jr. et al.*, No. 89-5518 (4th Cir. Jan. 22, 1990), addressing the sufficiency of the evidence supporting Mr. Spannaus' conviction, states that:

> The record fully supports Spannaus' conviction . . . Spannaus responded to one lender complaint stating that the lender had no right to get his money back; and Spannaus wrote letters to lenders assuring them that the repayment program had been restored and issued letters of indebtedness stating that loans would be repaid at stated times and rates, even though he knew of the *campaign's* nonpayment policy.

Attachment 12, pages 17-18 [emphasis added]. The court also reviewed the District Court's evidentiary rulings and jury instructions. The defendants did not, in either situation, ask the court to review the District Court's treatment of the evidence pertaining to Mr. LaRouche's presidential campaign committees.

1984 presidential campaign. On June 30, 1987, the Federal grand jury in Boston added Mr. LaRouche to the indictment of December 16, 1986, on charges of obstruction of justice. Mr. LaRouche was indicted for allegedly ordering members of his campaign staff and others working for his numerous organizations to stall the grand jury investigation. The trial began on December 17, 1987. However, on May 4, 1988, after four months of trial, Judge Robert Keeton declared a mistrial due to "severe hardships" that would have been suffered by four of the jurors if the trial continued. *See also United States v. The LaRouche Campaign, et al.*, 695 F. Supp. 1317 (D. Mass. 1988). A retrial was set for January 3, 1989; however, the case was dismissed on March 2, 1989. The case was dismissed primarily due to Mr. LaRouche's intervening conviction in Virginia.

On December 10, 1987, the jury in Boston found Roy Frankhauser guilty on charges of conspiring to cover up the alleged credit card and loan fraud committed by Mr. LaRouche's 1984 presidential campaign committee. Mr. Frankhauser was a security adviser to Mr. LaRouche and had instructed the Committee and Mr. LaRouche's supporters on ways to stop or impede the grand jury's investigation. *See U.S. v. The LaRouche Campaign,* Crim. No. 86-323-K, pp. 23-35.[14]

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[14] The state of Minnesota also investigated the fundraising practices of several of Mr. LaRouche's organization's *See Caucus Distributors, Inc. v. Commissioner of Commerce,* 422 N.W.2d 264 (Minn. App. 1988). Included as one of the organizations investigated was Independent Democrats for LaRouche ("IDL"), Mr. LaRouche's general election committee. IDL's promissory notes were found to be unlicensed securities. IDL was ordered to cease and desist offering or selling those instruments without first obtaining an opinion letter from the Minnesota Department of Commerce. Although this case did not explicitly deal with fraud, the court did state that the purpose of

As the previous discussion demonstrates, Mr. LaRouche and his campaign committees have a long history of fraudulent fundraising practices related to their campaigns. These practices have not only resulted in substantial violations of the Federal election laws, but also his conviction for criminal activity and his subsequent incarceration in Federal prison for 15 years. In light of these problems, the Committee has suggested, as a possible alternative, that a contribution confirmation process may be more appropriate in this instance. *See* Attachment 20. However, there is no way to ensure, short of a confirmation of each and every contribution, that these long-held practices are not being employed in Mr. LaRouche's 1992 campaign. Moreover, such a process would be an unreasonable burden on the Commission's resources.[15] In

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the state's securities law was, "to protect members of the public from fraud and imposition." *Caucus Distributors, Inc.*, 422 N.W.2d at 272. The court stated further that the Federal election campaign laws did not pre-empt Minnesota's security laws and that:

> The bare claim of a first amendment interest does not insulate behavior from responsible judicial scrutiny. The state has an interest in protecting citizens from abusive practices in solicitation of funds for charity, even when the charitable organization has a purpose protected by the first amendment.

Id. at 273.

[15] In a letter dated February 26, 1992, the Committee proposed that the Commission should accept its contribution confirmation results as evidence that each contribution submitted for matching had the requisite donative intent. *See* Letter from Richard Mayberry, Esq., Agenda Document #92-31-A (February 27, 1992). Attachment 22. The Committee also states that if its proposal is not suitable, the Commission should make a prompt determination on this matter. *Id.* The Commission expressly rejects the Committee's proposal. Notably, the Committee's proposal would not ensure that the contributions were not fraudulently induced because, *inter alia*, the confirmation was conducted by the Committee.

addition, Mr. LaRouche's attempt to alter his 1992 letter of candidate agreements and certifications is further evidence that he has no intention of abiding by those promises. In fact, Mr. LaRouche has challenged the language in the letter of candidate agreements and certifications twice before, in 1980 and 1984. In 1980, Mr. LaRouche tried to avoid paying a civil penalty based on the language contained in the letter. More importantly, in 1984, Mr. LaRouche refused to supply the Commission with requested information from one of his organizations, stating that he had no authority to compel the production of the requested information. Thus, there is a clear basis for the Commission to determine that Mr. LaRouche's candidate agreement cannot be accepted on its face.

C. The Commission Followed Established Procedures in Making its Determinations With Respect to Mr. LaRouche's Eligibility

The Committee's remaining arguments are not compelling. Contrary to its assertions, the Commission has not singled out Mr. LaRouche for discriminatory treatment.[16]

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[16] This argument is hardly a new claim by Mr. LaRouche and his supporters. In fact, this argument was first leveled at the Commission by Mr. LaRouche's 1976 committee, when the Commission denied Mr. LaRouche's eligibility for matching funds. When Mr. LaRouche and his 1976 committee challenged the determination in court, his counsel argued, *inter alia,* that the Commission "has singled out Lyndon LaRouche for different unusual treatment." *See* Brief for Petitioners at 18, *Committee to Elect Lyndon LaRouche v. FEC,* No. 77-1184 (D.C. Cir.). The court subsequently affirmed the Commission's determination. More important, the court rejected LaRouche's discrimination complaint, finding that no other matching fund submission in 1976 raised questions as LaRouche's did, and that therefore, "we see no basis for finding an equal protection violation simply because the Commission accorded unique treatment to a unique application." *See Committee to Elect LaRouche v. FEC,* 613 F.2d 834, 848 (D.C. Cir. 1979).

Rather, following the procedures set forth in 11 C.F.R. § 9033.10,[17] the Commission has sought to apply the statute and regulations to the unique facts presented by Mr. LaRouche's application. Mr. LaRouche's past actions evidence a consistent pattern of deceptive practices raise fundamental questions regarding the fundraising techniques used to finance his past presidential campaigns. No other publicly funded candidate has established a pattern and practice of submitting false information to the Commission nor has another campaign admitted to knowing and willful violations of FECA for submitting false or misleading information regarding contributions submitted for matching. Mr. LaRouche and his associates have committed the same types of violations of the FECA and the Matching Payment Act and displayed the same fraudulent conduct over the course of 15 years. The Committee's response fails to present a single case where another publicly funded candidate has exhibited a similar pattern of abuse.

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[17] The rules set forth at 11 C.F.R. § 9033.10 govern the procedures for initial and final determinations. Section 9033.10(b) provides, with respect to initial determinations, that:

> [i]f the Commission makes an initial receive matching funds for one or more of the reasons indicated in 11 C.F.R. § 9033.10(a), the Commission will notify the candidate of its initial determination. The notification will give the legal and factual reasons for the determination and advise the candidate of the evidence on which the Commission's intial determination is based. The candidate will be given an opportunity to comply with the requirements at issue or to submit, within the time provided . . . , written legal and factual materials to demonstrate that the candidate has satisfied those requirements. Such materials may be submitted by counsel if the candidate so desires.

11 C.F.R. § 9033.10(b).

With respect to the arguments presented concerning state laws that restrict the ballot access of convicted felons such as Mr. LaRouche, we note that Mr. LaRouche's name will appear on the ballot in several states that had initially indicated that he would be excluded. Some of these states were required to place Mr. LaRouche's name on the ballot by court order. *See Lyndon H. LaRouche, Jr. v. Richard Austin,* File No. 92-7093-AW (Cir. Ct. of Mich. Jan. 28, 1992); *Lyndon H. LaRouche, Jr. v. Secretary of State,* No. D-1988 (Tex. Jan. 23, 1992). At the present time, Mr. LaRouche's name will appear on at least 14 states ballots. Therefore, the Commission agrees that any ballot access problems that Mr. LaRouche may face should not form the basis for denying his eligibility.

VI. CONCLUSION

The Committee's response does little to refute the litany of abuse and non-compliance that Mr. LaRouche has had toward the matching payment program. Despite the Committee's protestations, the Commission has an obligation to consider the evidence of Mr. LaRouche's conviction for activities relating to fundraising practices for a publicly financed campaign, his previous non-compliance with the Matching Payment Act, and his repudiation of previous letters of candidate agreements and certifications in reviewing his current application. A review of the record shows that Mr. LaRouche has been convicted of fraud in connection with the financing of a previous campaign and has demonstrated a pattern of non-compliance with the FECA and the Matching Payment Act evidenced by the numerous enforcement matters and lawsuits instituted over the past 15 years. In fact, there has not been one election cycle in which Mr. LaRouche or his agents have not run afoul of the FECA or the Matching Payment Act.

Mr. LaRouche has, over the past 15 years, established a pattern and practice of submitting false information to the Commission, fraudulently inducing individuals to contribute to his campaigns, and submitting contributions for matching which lacked the requisite donative intent. In addition, Mr. LaRouche has also been convicted of conspiring to defraud another Federal agency, the Internal Revenue Service. In light of his past actions, Mr. LaRouche's unsuccessful attempt to alter his 1992 letter of candidate agreements and certifications shows continuing attempts to avoid adherence to the requirements of the FECA and the Matching Payment Act. Moreover, the Commission does not have to ignore the fact that Mr. LaRouche is still serving a prison term for convictions related to his fundraising practices.

Therefore, based on the application of the Matching Payment Act, the Commission's regulations and the case law to the unique facts of this situation, the Commission has made a final determination pursuant to 11 C.F.R. § 9033.10(c) that Mr. LaRouche be denied eligibility to receive Federal matching funds for the 1992 election cycle. The Commission bases its determination on the record discussed above, including a pattern and practice of fraud relating to Mr. LaRouche's fundraising activities for his previous presidential campaigns and his previous disregard for his candidate agreements and the requirements of FECA and the Matching Payment Act. Given these facts, it is clearly reasonable to conclude that the promises Mr. LaRouche makes in his new candidate agreement submitted pursuant to 26 U.S.C. § 9033 do not supply the kind of assurances of compliance with the law that Congress intended to require. The Commission recognizes that this presents a difficult case, but believes that Mr. LaRouche's past actions, taken with the Commission's

statutory obligation to protect the public fisc, warrants such a conclusion.

VII. DETERMINATION

Pursuant to 11 C.F.R. § 9033.10(c), the Commission has made a final determination that Mr. Lyndon H. LaRouche, Jr. be denied eligibility to receive Federal matching funds for the 1992 election cycle.

ATTACHMENTS

1. Letter of Candidate Agreements and Certifications submitted by Lyndon H. LaRouche, Jr., dated November 11, 1991.
2. Memorandum from Robert J. Costa, dated November 20, 1991.
3. Memorandum to Robert J. Costa, dated November 25, 1991.
4. Letter from Odin P. Anderson, Esq., dated November 26, 1991.
5. Revised Letter of Candidate Agreements and Certifications submitted by Lyndon H. LaRouche, Jr., dated November 28, 1991.
6. Letter from Odin P. Anderson, Esq., dated December 11, 1991.
7. Virginia Federal Indictment, *U.S. v. Lyndon H. LaRouche, Jr., et al.*, Crim. No. 88-243-A (E.D. Va. Jan. 27, 1989).
8. Virginia Federal Trial Transcript, *U.S. v. Lyndon H. LaRouche, Jr., et al.*, Crim. No. 88-243-A, vol. XVI, pp. 1, 2, 12-15, 26 (E.D. Va. Dec. 14, 1988).
9. Virginia Federal Jury Instructions, *U.S. v. Lyndon H. LaRouche, Jr., et al.*, Crim. No. 88-243-A, vol. XV (E.D. Va. Dec. 15, 1988).

10. Virginia Federal Verdict, *U.S. v. Lyndon H. LaRouche, Jr., et al.*, Crim. No. 88-243-A, vol. XVI (E.D. Va. Dec. 15, 1988).
11. Boston Federal Indictment, *U.S. v. The LaRouche Campaign, et al.*, Crim. No. 86-323-K (D. Mass. Dec. 16, 1986).
12. Virginia Federal Appeal, *U.S. v. Lyndon H. LaRouche, Jr., et al.*, No. 89-5518 (4th Cir. Jan. 22, 1990).
13. Initial Determination, Agenda Document #91-137, approved December 19, 1991.
14. Committee's Response, dated January 22, 1992.
15. Letter from Kathy A. Magraw, dated January 30, 1992.
16. Memorandum to the Commission, dated January 31, 1992.
17. Letter to Richard Mayberry, Esq., dated February 5, 1992.
18. Letter from Kathy A. Magraw, Supplemental Response, dated February 5, 1992.
19. Committee's Response to Request for Additional Information, dated February 7, 1992.
20. Letter from Richard Mayberry, Esq., dated February 19, 1992.
21. Virginia Federal Trial Transcript, *U.S. v. Lyndon H. LaRouche, Jr., et al.*, Crim. No. 88-243-A, vol. II, pp. 1-21 (E.D. Va. Nov. 22, 1988).
22. Letter from Richard Mayberry, Esq., dated February 26, 1992 (Agenda Document #92-31-A).

BEFORE THE FEDERAL ELECTION COMMISSION

Agenda Documents #92-31 and #92-31-A

In the Matter of

Eligibility of Lyndon H. LaRouche, Jr. to Receive Presidential Primary Matching Funds: Final Determination.

CERTIFICATION

I, Delores R. Harris, recording secretary for the Federal Election Commission open meeting on February 27, 1992, do hereby certify that the Commission decided by a vote of 6-0 to take the following actions with respect to Agenda Document #92-31:

1. Make a final determination pursuant to 11 C.F.R. § 9033.10(c) that Lyndon H. LaRouche, Jr. be denied eligibility to receive Federal matching funds for the 1992 election cycle; and
2. Approve the statement of legal and factual reasons in support of the Commission's initial determination, as amended by the General Counsel's office at this meeting.

Commissioners Aikens, Elliott, McDonald, McGarry, Potter and Thomas voted affirmatively for the decision.

Attest:

/s/ DELORES R. HARRIS
Delores R. Harris
Secretary of the Commission

February 28, 1992
Date

APPENDIX C

Chapter 96 – Presidential Primary Matching Payment Account

§ 9031. Short title

This chapter may be cited as the "Presidential Primary Matching Payment Account Act".

§ 9032. Definitions

For the purposes of this chapter –

(1) The term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization.

(2) The term "candidate" means an individual who seeks nomination for election to be President of the United States. For purposes of this paragraph, an individual shall be considered to seek nomination for election if he –

(A) Takes the action necessary under the law of a State to qualify himself for nomination for election,

(B) receives contributions or incurs qualified campaign expenses, or

(C) gives his consent for any other person to receive contributions or to incur qualified campaign expenses on his behalf.

The term "candidate" shall not include any individual who is not actively conducting campaigns in more than one State in connection with seeking nomination for election to be President of the United States.

(3) The term "Commission" means the Federal Election Commission established by section 437c(a)(1) of title 2.

(4) Except as provided by section 9034(a), the term "contribution"—

(A) means a gift, subscription, loan, advance, or deposit of money, or anything of value, the payment of which was made on or after the beginning of the calendar year immediately preceding the calendar year of the presidential election with respect to which such gift, subscription, loan, advance, or deposit of money, or anything of value, is made, for the purpose of influencing the result of a primary election,

(B) means a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose,

(C) means funds received by a political committee which are transferred to that committee from another committee, and

(D) means the payment by any person other than a candidate, or his authorized committee, of compensation for the personal services of another person which are rendered to the candidate or committee without charge, but

(E) does not include—

(i) except as provided in subparagraph (D), the value of personal services rendered to or for the benefit of a candidate by an

individual who receives no compensation for rendering such service to or for the benefit of the candidate, or

(ii) payments under section 9037.

(5) The term "matching payment account" means the Presidential Primary Matching Payment Account established under section 9037(a).

(6) The term "matching payment period" means the period beginning with the beginning of the calendar year in which a general election for the office of President of the United States will be held and ending on the date on which the national convention of the party whose nomination a candidate seeks nominates its candidate for the office of President of the United States, or, in the case of a party which does not make such nomination by national convention, ending on the earlier of—

(A) the date such party nominates its candidate for the office of President of the United States, or

(B) the last day of the last national convention held by a major party during such calendar year.

(7) The term "primary election" means an election, including a runoff election or a nominating convention or caucus held by a political party, for the selection of delegates to a national nominating convention of a political party, or for the expression of a preference for the nomination of persons for election to the office of President of the United States.

(8) The term "political committee" means any individual, committee, association, or organization (whether or not incorporated) which accepts contributions or incurs qualified campaign expenses for

the purpose of influencing, or attempting to influence, the nomination of any person for election to the office of President of the United States.

(9) The term "qualified campaign expense" means a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value—

(A) incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination for election, and

(B) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which the expense is incurred or paid.

For purposes of this paragraph, an expense is incurred by a candidate or by an authorized committee if it is incurred by a person specifically authorized in writing by the candidate or committee, as the case may be, to incur such expense on behalf of the candidate or the committee.

(10) The term "State" means each State of the United States and the District of Columbia.

§ 9033. Eligibility for payments

(a) *Conditions.* To be eligible to receive payments under section 9037, a candidate shall, in writing—

(1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses,

(2) agree to keep and furnish to the Commission any records, books, and other information it may request, and

(3) agree to an audit and examination by the Commission under section 9038 and to pay any

amounts required to be paid under such section.

(b) *Expense limitation; declaration of intent; minimum contributions.* To be eligible to receive payments under section 9037, a candidate shall certify to the Commission that—

(1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035,

(2) the candidate is seeking nomination by a political party for election to the office of President of the United States,

(3) the candidate has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States, and

(4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.

(c) *Termination of payments.*

(1) *General rule.* Except as provided by paragraph (2), no payment shall be made to any individual under section 9037—

(A) if such individual ceases to be a candidate as a result of the operation of the last sentence of section 9032(2); or

(B) more than 30 days after the date of the second consecutive primary election in which such individual receives less than 10 percent of the number of votes cast for all candidates of the same party for the same office in such primary election, if such individual permitted or authorized the appearance of his name on the ballot,

unless such individual certifies to the Commission that he will not be an active candidate in the primary involved.

(2) *Qualified campaign expenses; payments to Secretary.* Any candidate who is ineligible under paragraph (1) to receive any payments under section 9037 shall be eligible to continue to receive payments under section 9037 to defray qualified camp ign expenses incurred before the date upon which such candidate becomes ineligible under paragraph (1).

(3) *Calculation of voting percentage.* For purposes of paragraph (1)(B), if the primary elections involved are held in more than one State on the same date, a candidate shall be treated as receiving that percentage of the votes on such date which he received in the primary election conducted on such date in which he received the greatest percentage vote.

(4) *Reestablishment of eligibility.*

(A) In any case in which an individual is ineligible to receive payments under section 9037 as a result of the operation of paragraph (1)(A), the Commission may subsequently determine that such individual is a candidate upon a finding that such individual is actively seeking election to the office of President of the United States in more than one State. The Commission shall make such determination without requiring such individual to reestablish his eligibility to receive payments under subsection (a).

(B) Notwithstanding the provisions of paragraph (1)(B), a candidate whose payments have been terminated under paragraph (1)(B) may again receive payments (including amounts he would have received but for paragraph (1)(B)) if he receives 20 percent or more of the total

number of votes cast for candidates of the same party in a primary election held after the date on which the election was held which was the basis for terminating payments to him.

§ 9034. Entitlement of eligible candidates to payments

(a) *In general.* Every candidate who is eligible to receive payments under section 9033 is entitled to payments under section 9037 in an amount equal to the amount of each contribution received by such candidate on or after the beginning of the calendar year immediately preceding the calendar year of the presidential election with respect to which such candidate is seeking nomination, or by his authorized committees, disregarding any amount of contributions from any person to the extent that the total of the amounts contributed by such person on or after the beginning of such preceding calendar year exceeds $250. For purposes of this subsection and section 9033(b), the term "contribution" means a gift of money made by a written instrument which identifies the person making the contribution by full name and mailing address, but does not include a subscription, loan, advance, or deposit of money, or anything of value or anything described in subparagraph (B),(C), or (D) of section 9032(4).

(b) *Limitations.* The total amount of payments to which a candidate is entitled under subsection (a) shall not exceed 50 percent of the expenditure limitation applicable under section 441a(b)(1)(A) of title 2.

§ 9035. Qualified campaign expense limitations

(a) *Expenditure limitations.* No candidate shall knowingly incur qualified campaign expenses in excess of the expenditure limitation applicable under section 441a(b)(1)(A) of title 2, and no candidate shall knowingly make expenditures from his personal funds, or the per-

sonal funds of his immediate family, in connection with his campaign for nomination for election to the office of President in excess of, in the aggregate, $50,000.

(b) *Definition of immediate family.* For purposes of this section, the term "immediate family" means a candidate's spouse, and any child, parent, grandparent, brother, half-brother, sister, or half-sister of the candidate, and the spouses of such persons.

§ 9036. Certification by Commission

(a) *Initial certifications.* Not later than 10 days after a candidate establishes his eligibility under section 9033 to receive payments under section 9037, the Commission shall certify to the Secretary for payment to such candidate under section 9037 payment in full of amounts to which such candidate is entitled under section 9034. The Commission shall make such additional certifications as may be necessary to permit candidates to receive payments for contributions under section 9037.

(b) *Finality of determinations.* Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter, are final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9038 and judicial review under section 9041.

§ 9037. Payments to eligible candidates

(a) *Establishment of account.* The Secretary shall maintain in the Presidential Election Campaign Fund established by section 9006(a), in addition to any account which he maintains under such section, a separate account to be known as the Presidential Primary Matching Payment Account. The Secretary shall deposit into the matching payment account, for use by the candidate of any

political party who is eligible to receive payments under section 9033, the amount available after the Secretary determines that amounts for payments under section 9006(c) and for payments under section 9008(b)(3) are available for such payments.

(b) *Payments from the matching payment account.* Upon receipt of a certification from the Commission under section 9036, but not before the beginning of the matching payment period, the Secretary shall promptly transfer the amount certified by the Commission from the matching payment account to the candidate. In making such transfers to candidates of the same political party, the Secretary shall seek to achieve an equitable distribution of funds available under subsection (a), and the Secretary shall take into account, in seeking to achieve an equitable distribution, the sequence in which such certifications are received.

§ 9038. Examinations and audits; repayments

(a) *Examinations and audits.* After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under section 9037.

(b) *Repayments.* –

(1) If the Commission determines that any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which such candidate was entitled under section 9034, it shall notify the candidate, and the candidate shall pay to the Secretary an amount equal to the amount of excess payments.

(2) If the Commission determines that any amount of any payment made to a candidate from the matching payment account was used for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made, or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses,

it shall notify such candidate of the amount so used, and the candidate shall pay to the Secretary an amount equal to such amount.

(3) Amounts received by a candidate from the matching payment account may by retained for the liquidation of all obligations to pay qualified campaign expenses incurred for a period not exceeding 6 months after the end of the matching payment period. After all obligations have been liquidated, that portion of any unexpended balance remaining in the candidate's accounts which bears the same ratio to the total unexpended balance as the total amount received from the matching payment account bears to the total of all deposits made into the candidate's accounts shall be promptly repaid to the matching payment account.

(c) *Notification.* No notification shall be made by the Commission under subsection (b) with respect to a matching payment period more than 3 years after the end of such period.

(d) *Deposit of repayments.* All payments received by the Secretary under subsection (b) shall be deposited by him in the matching payment account.

§ 9039. Reports to Congress; regulations

(a) *Reports.* The Commission shall, as soon as practicable after each matching payment period, submit a full report to the Senate and House of Representatives setting forth—

(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees,

(2) the amounts certified by it under section 9036 for payment to each eligible candidate, and

(3) the amount of payments, if any, required from candidates under section 9038, and the reasons for each payment required.

Each report submitted pursuant to this section shall be printed as a Senate document.

(b) *Regulations, etc.* The Commission is authorized to prescribe rules and regulations in accordance with the provisions of subsection (c), to conduct examinations and audits (in addition to the examinations and audits required by section 9038(a)), to conduct investigations, and to require the keeping and submission of any books, records, and information, which it determines to be necessary to carry out its responsibilities under this chapter.

(c) *Review of regulations.*

(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House of Representatives, in

accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. Whenever a committee of the House of Representatives reports any resolution relating to any such rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.

(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(4) For purposes of this subsection, the term "rule or regulation" means a provision or series of interrelated provisions stating a single separable rule of law.

§ 9040. Participation by Commission in judicial proceedings

(a) *Appearance by counsel.* The Commission is authorized to appear in and defend against any action instituted under this section, either by attorneys employed in

its office or by counsel whom it may appoint without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) *Recovery of certain payments.* The Commission is authorized, through attorneys and counsel described in subsection (a), to institute actions in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary as a result of an examination and audit made pursuant to section 9038.

(c) *Injunctive relief.* The Commission is authorized, through attorneys and counsel described in subsection (a), to petition the courts of the United States for such injunctive relief as is appropriate to implement any provision of this chapter.

(d) *Appeal.* The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section.

§ 9041. Judicial review

(a) *Review of agency action by the Commission.* Any agency action by the Commission made under the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia Circuit upon petition filed in such court within 30 days after the agency action by the Commission for which review is sought.

(b) *Review procedures.* The provisions of chapter 7 of title 5, United States Code, apply to judicial review of any agency action, as defined in section 551(13) of title 5, United States Code, by the Commission.

§ 9042. Criminal penalties

(a) *Excess campaign expenses.* Any person who violates the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both. Any officer or member of any political committee who knowingly consents to any expenditure in violation of the provisions of section 9035 shall be fined not more than $25,000, or imprisoned not more than 5 years, or both.

(b) *Unlawful use of payments.*

(1) It is unlawful for any person who receives any payment under section 9037, or to whom any portion of any such payment is transferred, knowingly and willfully to use, or authorize the use of, such payment or such portion for any purpose other than—

(A) to defray qualified campaign expenses, or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray qualified campaign expenses.

(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(c) *False statements, etc.*

(1) It is unlawful for any person knowingly and willfully—

(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this chapter, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to

falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter, or

(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.

(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(d) *Kickbacks and illegal payments.*

(1) It is unlawful for any person knowingly and willfully to give or accept any kickback or any illegal payment in connection with any qualified campaign expense of a candidate, or his authorized committees, who receives payments under section 9037.

(2) Any person who violates the provisions of paragraph (1) shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or illegal payment in connection with any qualified campaign expense of a candidate or his authorized committees shall pay to the Secretary for deposit in the matching payment account, an amount equal to 125 percent of the kickback or payment received.

APPENDIX D

11 CFR ch. 1 (1-1-92 Edition)

PART 9033 – ELIGIBILITY FOR PAYMENTS

Sec.

9033.1 Candidate and committee agreements.
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9033.11 Documentation of disbursements.
9033.12 Production of computerized information.

AUTHORITY: 26 U.S.C. 9033 and 9039(b)

SOURCE: 56 FR 35930. July 29, 1991, unless otherwise noted.

§ 9033.1 Candidate and committee agreements.

(a) *General.* (1) A candidate seeking to become eligible to receive Presidential primary matching fund payments shall agree in a letter signed by the candidate to the Commission that the candidate and the candidate's authorized committee(s) will comply with the conditions set forth in 11 CFR 9033.1(b). The candidate may submit the letter containing the agreements required by this section at any time after January 1 of the year immediately preceding the Presidential election year.

(2) The Commission will not consider a candidate's threshold submission until the candidate has submitted a candidate agreement that meets the requirements of this section.

(b) *Conditions.* The candidate shall agree that:

(1) The candidate has the burden of proving that disbursements by the candidate or any authorized committee(s) or agents thereof are qualified campaign expenses as defined at 11 CFR 9032.9.

(2) The candidate and the candidate's authorized committee(s) will comply with the documentation requirements set forth in 11 CFR 9033.11.

(3) The candidate and the candidate's authorized committee(s) will provide an explanation, in addition to complying with the documentation requirements, of the connection between any disbursements made by the candidate or authorized committee(s) of the candidate and the campaign if requested by the Commission.

(4) The candidate and the candidate's authorized committee(s) will keep and furnish to the Commission all documentation for matching fund submissions, any books, records (including bank records for all accounts), and supporting documentation and other information that the Commission may request.

(5) The candidate and the candidate's authorized committee(s) will keep and furnish to the Commission all documentation relating to disbursements and receipts including any books, records (including bank records for all accounts), all documentation required by this section including those required to be maintained under 11 CFR 9033.11, and other information that the Commission may request. If the candidate or the candidate's authorized committee maintains or uses computerized information containing any of the categories of data listed in 11 CFR 9033.12(a), the committee will provide computerized mag-

netic media such as magnetic tapes or magnetic diskettes, containing the computerized information at the times specified in 11 CFR 9038.1(b)(1) that meet the requirements of 11 CFR 9033.12(b). Upon request, documentation explaining the computer system's software capabilities shall be provided, and such personnel as are necessary to explain the operation of the computer system's software and the computerized information prepared or maintained by the committee shall also be made available.

(6) The candidate and the candidate's authorized committee(s) will obtain and furnish to the Commission upon request all documentation relating to funds received and disbursements made on the candidate's behalf by other political committees and organizations associated with the candidate.

(7) The candidate and the candidate's authorized committee(s) will permit an audit and examination pursuant to 11 CFR part 9038 of all receipts and disbursements including those made by the candidate, all authorized committee(s) and any agent or person authorized to make expenditures on behalf of the candidate or committee(s). The candidate and authorized committee(s) shall facilitate the audit by making available in one central location, office space, records and such personnel as are necessary to conduct the audit and examination, and shall pay any amounts required to be repaid under 11 CFR parts 9038 and 9039.

(8) The candidate and the candidate's authorized committee(s) will submit the name and mailing address of the person who is entitled to receive matching fund payments on behalf of the candidate and the name and address of the campaign depository designated by the candidate as required by 11 CFR part 103 and 11 CFR 9037.3. Changes in the information required by this paragraph shall not be

effective until submitted to the Commission in a letter signed by the candidate or the Committee treasurer.

(9) The candidate and the candidate's authorized committee(s) will prepare matching fund submissions in accordance with the Federal Election Commission's Guideline for Presentation in Good Order.

(10) The candidate and the candidate's authorized committee(s) will comply with the applicable requirements of 2 U.S.C. 431 *et seq.*; 26 U.S.C. 9031 *et seq.* and the Commission's regulations at 11 CFR parts 100-116, and 9031-9039.

(11) The candidate and the candidate's authorized committee(s) will pay any civil penalties included in a conciliation agreement imposed under 2 U.S.C. 437g against the candidate, any authorized committee of the candidate or any agent thereof.

§ 9033.2 Candidate and committee certifications; threshold submission.

(a) *General.* (1) A candidate seeking to become eligible to receive Presidential primary matching fund payments shall make the certifications set forth in 11 CFR 9033.2(b) to the Commission in a written statement signed by the candidate. The candidate may submit the letter containing the required certifications at any time after January 1 of the year immediately preceding the Presidential election year.

(2) The Commission will not consider a candidate's threshold submission until the candidate has submitted candidate certifications that meet the requirements of this section.

(b) *Certifications.* (1) The candidate shall certify that he or she is seeking nomination by a political party to the Office of President in more than one State. For purposes of this section, in order for a candidate to be deemed to

be seeking nomination by a political party to the office of President, the party whose nomination the candidate seeks must have a procedure for holding a primary election, as defined in 11 CFR 9032.7, for nomination to that office. For purposes of this section, the term "political party" means an association, committee or organization which nominates an individual for election to the office of President. The fact that an association, committee or organization qualifies as a political party under this section does not affect the party's status as a national political party for purposes of 2 U.S.C. 441a(a)(1)(B) and 441a(a)(2)(B).

(2) The candidate and the candidate's authorized committee(s) shall certify that they have not incurred and will not incur expenditures in connection with the candidate's campaign for nomination, which expenditures are in excess of the limitations under 11 CFR part 9035.

(3) The candidate and the candidate's authorized committee(s) shall certify:

(i) That they have received matchable contributions totalling more than $5,000 in each of at least 20 States; and

(ii) That the matchable contributions are from individuals who are residents of the State for which their contributions are submitted.

(iii) A maximum of $250 of each individual's aggregate contributions will be considered as matchable contributions for the purpose of meeting the thresholds of this section.

(iv) For purposes of this section, contributions of an individual who maintains residences in more than one State may only be counted toward the $5,000 threshold for the State from which the earliest contribution was made by that contributor.

(c) *Threshold submission.* To become eligible to receive matching payments, the candidate shall submit

documentation of the contributions described in 11 CFR 9033.2(b)(3) to the Commission for review. The submission shall follow the format and requirements of 11 CFR 9036.1.

§ 9033.3 Expenditure limitation certification.

(a) If the Commission makes an initial determination that a candidate or the candidate's authorized committee(s) have knowingly and substantially exceeded the expenditure limitations at 11 CFR part 9035 prior to that candidate's application for certification, the Commission may make an initial determination that the candidate is ineligible to receive matching funds.

(b) The Commission will notify the candidate of its initial determination, in accordance with the procedures outlined in 11 CFR 9033.10(b). The candidate may submit, within 20 calendar days after service of the Commission's notice, written legal or factual materials, in accordance with 11 CFR 9033.10(b), demonstrating that he or she has not knowingly and substantially exceeded the expenditure limitations at 11 CFR part 9035.

(c) A final determination of the candidate's ineligibility will be made by the Commission in accordance with the procedures outlined in 11 CFR 9033.10(c).

(d) A candidate who receives a final determination of ineligibility under 11 CFR 9033.3(c) shall be ineligible to receive matching fund payments under 11 CFR 9034.1.

§ 9033.4 Matching payment eligibility threshold requirements.

(a) The Commission will examine the submission made under 11 CFR 9033.1 and 9033.2 and either –

(1) Make a determination that the candidate has satisfied the minimum contribution threshold requirements under 11 CFR 9033.2(c); or

(2) Make an initial determination that the candidate has failed to satisfy the matching payment threshold requirements. The Commission will notify the candidate of its initial determination in accordance with the procedures outlined in 11 CFR 9033.10(b). The candidate may, within 30 calendar days after service of the Commission's notice, satisfy the threshold requirements or submit in accorance with 11 CFR 9033.10(b) written legal or factual materials to demonstrate that he or she has satisfied those requirements. A final determination by the Commission that the candidate has failed to satisfy threshold requirements will be made in accordance with the procedures outlined in 11 CFR 9033.10(c).

(b) In evaluating the candidate's submission under 11 CFR 9033.1 and 9033.2, the Commission may consider other information in its possession, including but not limited to past actions of the candidate in an earlier publicly-financed campaign, that is relevant to a determination regarding the candidate's eligibility for matching funds.

(c) The Commission will make its examination and determination under this section as soon as practicable. During the Presidential election year, the Commission will generally complete its review and make its determination within 15 business days.

§ 9033.5 Determination of ineligibility date.

The candidate's date of ineligibility shall be whichever date by operation of 11 CFR 9033.5(a), (b), or (c) occurs first. After the candidate's date of ineligibility, he or she may only receive matching payments to the extent that he or she has net outstanding campaign obligations as defined in 11 CFR 9034.5.

(a) *Inactive candidate.* The ineligibility date shall be the day on which an individual ceases to be a candidate

because he or she is not actively conducting campaigns in more than one State in connection with seeking the Presidential nomination. This date shall be the earliest of –

(1) The date the candidate publicly announces that he or she will not be actively conducting campaigns in more than one State; or

(2) The date the candidate notifies the Commission by letter that he or she is not actively conducting campaigns in more than one State; or

(3) The date which the Commission determines under 11 CFR 9033.6 to be the date that the candidate is not actively seeking election in more than one State.

(b) *Insufficient votes.* The ineligibility date shall be the 30th day following the date of the second consecutive primary election in which such individual receives less than 10 percent of the number of popular votes cast for all candidates of the same party for the same office in that primary election, if the candidate permitted or authorized his or her name to appear on the ballot, unless the candidate certifies to the Commission at least 25 business days prior to the primary that he or she will not be an active candidate in the primary involved.

(1) The Commission may refuse to accept the candidate's certification if it determines under 11 CFR 9033.7 that the candidate is an active candidate in the primary involved.

(2) For purposes of this paragraph, if the candidate is running in two primary elections in different States on the same date, the highest percentage of votes the candidate receives in any one State will govern. Separate primary elections held in more than one State on the same date are not deemed to be consecutive primaries. If two primary elections are held on the same date in the same State (e.g., a primary to select delegates to a national nominating con-

vention and a primary for the expression of preference for the nomination of candidates for election to the office of President), the highest percentage of votes a candidate receives in either election will govern. If two or more primaries are held in the same State on different dates, the earliest primary will govern.

(3) If the candidate certifies that he or she will not be an active candidate in a particular primary, and the Commission accepts the candidate's certification, the primary involved shall not be counted in determining the candidate's date of ineligibility under paragraph (b) of this section, regardless of the percentage of popular votes cast for the candidate in that primary.

(c) *End of matching payment period.* The ineligibility date shall be the last day of the matching payment period for the candidate as specified in 11 CFR 9032.6.

(d) *Reestablishment of eligibility.* If the Commission has determined that a candidate is ineligible under 11 CFR 9033.5 (a) or (b), the candidate may reestablish eligibility to receive matching funds under 11 CFR 9033.8.

§ 9033.6 Determination of inactive candidacy.

(a) *General.* The Commission may, on the basis of the factors listed in 11 CFR 9033.6(b) below, make a determination that a candidate is no longer actively seeking nomination for election in more than one State. Upon a final determination by the Commission that a candidate is inactive, that candidate will become ineligible as provided in 11 CFR 9033.5.

(b) *Factors considered.* In making its determination of inactive candidacy, the Commission may consider, but is not limited to considering, the following factors:

(1) The frequency and type of public appearances, speeches, and advertisements;

(2) Campaign activity with respect to soliciting contributions or making expenditures for campaign purposes;

(3) Continued employment of campaign personnel or the use of volunteers;

(4) The release of committed delegates;

(5) The candidate urges his or her delegates to support another candidate while not actually releasing committed delegates;

(6) The candidate urges supporters to support another candidate.

(c) *Initial determination.* The Commission will notify the candidate of its initial determination in accordance with the procedures outlined in 11 CFR 9033.10(b) and will advise the candidate of the date on which active campaigning in more than one State ceased. The candidate may, within 15 business days after service of the Commission's notice, submit in accordance with 11 CFR 9033.10(b) written legal or factual materials to demonstrate that he or she is actively campaigning in more than one State.

(d) *Final determination.* A final determination of inactive candidacy will be made by the Commission in accordance with the procedures outlined in 11 CFR 9033.10(c).

§ 9033.7 Determination of active candidacy.

(a) Where a candidate certifies to the Commission under 11 CFR 9033.5(b) that he or she will not be an active candidate in an upcoming primary, the Commission may, nevertheless, on the basis of factors listed in 11 CFR 9033.6(b), make an initial determination that the candidate is an active candidate in the primary involved.

(b) The Commission will notify the candidate of its initial determination within 10 business days of receiving

the candidate's certification under 11 CFR 9033.5(b) or, if the timing of the activity does not permit notice during the 10 day period, as soon as practicable following campaign activity by the candidate in the primary state. The Commission's initial determination will be made in accordance with the procedures outlined in 11 CFR 9033.10(b). Within 10 business days after service of the Commission's notice the candidate may submit, in accordance with 11 CFR 9033.10(b), written legal or factual materials to demonstrate that he or she is not an active candidate in the primary involved.

(c) A final determination by the Commission that the candidate is active will be made in accordance with the procedures outlined in 11 CFR 9033.10(c).

§ 9033.8 Reestablishment of eligibility.

(a) *Candidates found to be inactive.* A candidate who has become ineligible under 11 CFR 9033.5(a) on the basis that he or she is not actively campaigning in more than one State may reestablish eligibility for matching payments by submitting to the Commission evidence of active campaigning in more than one State. In determining whether the candidate has reestablished eligibility, the Commission will consider, but is not limited to considering, the factors listed in 11 CFR 9033.6(b). The day the Commission determines to be the day the candidate becomes active again will be the date on which eligibility is reestablished.

(b) *Candidates receiving insufficient votes.* A candidate determined to be ineligible under 11 CFR 9033.5(b) by failing to obtain the required percentage of votes in two consecutive primaries may have his or her eligibility reestablished if the candidate receives at least 20 percent of the total number of votes cast for candidates of the same party for the same office in a primary election held sub-

sequent to the date of the election which rendered the candidate ineligible.

(c) The Commission will make its determination under 11 CFR 9033.8 (a) or (b) without requiring the individual to reestablish eligibility under 11 CFR 9033.1 and 2. A candidate whose eligibility is reestablished under this section may submit, for matching payment, contributions received during ineligibility. Any expenses incurred during the period of ineligibility that would have been considered qualified campaign expenses if the candidate had been eligible during that time may be defrayed with matching payments.

§ 9033.9 Failure to comply with disclosure requirements or expenditure limitations.

(a) If the Commission receives information indicating that a candidate or his or her authorized committee(s) has knowingly and substantially failed to comply with the disclosure requirements of 2 U.S.C. 434 and 11 CFR part 104, or that a candidate has knowingly and substantially exceeded the expenditure limitations at 11 CFR part 9035, the Commission may make an initial determination to suspend payments to that candidate.

(b) The Commission will notify the candidate of its initial determination in accordance with the procedures outlined in 11 CFR 9033.10(b). The candidate will be given an opportunity, within 20 calendar days after service of the Commission's notice, to comply with the above cited provisions or to submit in accordance with 11 CFR 9033.10(b) written legal or factual materials to demonstrate that he or she is not in violation of those provisions.

(c) Suspension of payments to a candidate will occur upon a final determination by the Commission to suspend payments. Such final determination will be made in ac-

cordance with the procedures outlined in 11 CFR 9033.10(c).

(d)(1) A candidate whose payments have been suspended for failure to comply with reporting requirements may become entitled to receive payments if he or she subsequently files the required reports and pays or agrees to pay any civil or criminal penalties resulting from failure to comply.

(2) A candidate whose payments are suspended for exceeding the expenditure limitations shall not be entitled to receive further matching payments under 11 CFR 9034.1.

§ 9033.10 Procedures for initial and final determinations.

(a) *General.* The Commission will follow the procedures set forth in this section when making an initial or final determination based on any of the following reasons.

(1) The candidate has knowingly and substantially exceeded the expenditure limitations of 11 CFR part 9035 prior to the candidate's application for certification, as provided in 11 CFR 9033.3;

(2) The candidate has failed to satisfy the matching payment threshold requirements, as provided in 11 CFR 9033.4;

(3) The candidate is no longer actively seeking nomination in more than one state, as provided in 11 CFR 9033.6;

(4) The candidate is an active candidate in an upcoming primary despite the candidate's assertion to the contrary, as provided in 11 CFR 9033.7;

(5) The Commission receives information indicating that the candidate has knowingly and substantially failed to comply with the disclosure requirements or exceeded the expenditure limits, as provided in 11 CFR 9033.9; or

(6) The Commission receives information indicating that substantial assets of the candidate's authorized committee have been undervalued or not included in the candidate's statement of net outstanding campaign obligations or that the amount of outstanding campaign obligations has been otherwise overstated in relation to committee assets, as provided in 11 CFR 9034.5(g).

(b) *Initial determination.* If the Commission makes an initial determination that a candidate may not receive matching funds for one or more of the reasons indicated in 11 CFR 9033.10(a), the Commission will notify the candidate of its initial determination. The notification will give the legal and factual reasons for the determination and advise the candidate of the evidence on which the Commission's initial determination is based. The candidate will be given an opportunity to comply with the requirements at issue or to submit, within the time provided by the relevant section as referred to in 11 CFR 9033.10(a), written legal or factual materials to demonstrate that the candidate has satisfied those requirements. Such materials may be submitted by counsel if the candidate so desires.

(c) *Final determination.* The Commission will consider any written legal or factual materials timely submitted by the candidate before making its final determination. A final determination that the candidate has failed to satisfy the requirements at issue will be accompanied by a written statement of reasons for the Commission's action. This statement will explain the legal and factual reasons underlying the Commission's determination and will summarize the results of any investigation upon which the determination is based.

(d) *Effect on other determinations.* If the Commission makes an initial determination under this section, but decides to take no further action at that time, the Commission may use the legal and factual bases on which the in-

itial determination was based in any future repayment determination under 11 CFR part 9038 or 9039. A determination by the Commission under this section may be independent of any Commission decision to institute an enforcement proceeding under 2 U.S.C. 437g.

(e) *Petitions for rehearing.* Following a final determination under this section, the candidate may file a petition for rehearing in accordance with 11 CFR 9038.5(a).

§ 9033.11 Documentation of disbursements.

(a) *Burden of proof.* Each candidate shall have the burden of proving that disbursements made by the candidate or his or her authorized committee(s) or persons authorized to make expenditures on behalf of the candidate or committee(s) are qualified campaign expenses as defined in 11 CFR 9032.9. The candidate and his or her authorized committee(s) shall obtain and furnish to the Commission on request any evidence regarding qualified campaign expenses made by the candidate, his or her authorized committees and agents or persons authorized to make expenditures on behalf of the candidate or committee(s) as provided in 11 CFR 9033.11(b).

(b) *Documentation required.* (1) For disbursements in excess of $200 to a payee, the candidate shall present either:

(i) A receipted bill from the payee that states the purpose of the disbursement, or

(ii) If such a receipt is not available, a canceled check negotiated by the payee, and

(A) One of the following documents generated by the payee: A bill, invoice, or voucher that states the purpose of the disbursement; or

(B) Where the documents specified in 11 CFR 9033.11 (b)(1)(ii)(A) are not available, a voucher or contemporane-

ous memorandum from the candidate or the committee that states the purpose of the disbursement; or

(iii) If neither a receipted bill as specified in 11 CFR 9033.11(b)(1)(i) nor the supporting documentation specified in 11 CFR 9033.11(b)(1)(ii) is available, a canceled check negotiated by the payee that states the purpose of the disbursement.

(iv) Where the supporting documentation required in 11 CFR 9033.11(b)(1)(i), (ii) or (iii) is not available, the candidate or committee may present a canceled check and collateral evidence to document the qualified campaign expense. Such collateral evidence may include but is not limited to:

(A) Evidence demonstrating that the expenditure is part of an identifiable program or project which is otherwise sufficiently documented such as a disbursement which is one of a number of documented disbursements relating to a campaign mailing or to the operaton of a campaign office;

(B) Evidence that the disbursement is covered by a preestablished written campaign committee policy, such as a daily travel expense policy.

(2) For all other disbursements the candidate shall present:

(i) A record disclosing the identification of the payee, the amount, date and purpose of the disbursement, if made from a petty cash fund; or

(ii) A canceled check negotiated by the payee that states the identification of the payee, and the amount, date and purpose of the disbursement.

(3) For purposes of this section,

(i) *Payee* means the person who provides the goods or services to the candidate or committee in return for the disbursement; except that an individual will be considered a payee under this section if he or she receives $500 or less

advanced for travel and or/subsistence and if he or she is the recipient of the goods or services purchased.

(ii) *Purpose* means the identification of the payee, the date and amount of the disbursement, and a description of the goods or services purchased.

(c) *Retention of records.* The candidate shall retain records, with respect to each disbursement and receipt, including bank records, vouchers, worksheets, receipts, bills and accounts, journals, ledgers, fundraising solicitation material, accounting systems documentation, matching fund submissions, and any related materials documenting campaign receipts and disbursements, for a period of three years pursuant to 11 CFR 102.9(c), and shall present these records to the Commission on request.

(d) *List of capital and other assets*—

(1) *Capital assets.* The candidate or committee shall maintain a list of all capital assets whose purchase price exceeded $2000 when acquired by the candidate's authorized committee(s). The list shall include a brief description of each capital asset, the purchase price, the date it was acquired, the method of disposition and the amount received in disposition. For purposes of this section, *capital asset* shall be defined in accordance with 11 CFR 9034.5(c)(1).

(2) *Other assets.* The candidate or committee shall maintain a list of other assets acquired for use in fundraising or as collateral for campaign loans, if the aggregate value of such assets exceeds $5000. The list shall include a brief description of each such asset, the fair market value of each asset, the method of disposition and the amount received in disposition. The fair market value of other assets shall be determined in accordance with 11 CFR 9034.5(c)(2).

* * *

PART 9034—ENTITLEMENTS

Sec.

9034.1 Candidate entitlements.
9034.2 Matchable contributions.
9034.3 Non-matchable contributions.
9034.4 Use of contributions and matching payments.
9034.5 Net outstanding campaign obligations.
9034.6 Reimbursements for transportation and services made available to media personnel.
9034.7 Allocation of travel expenditures.
9034.8 Joint fundraising.
9034.9 Sale of assets acquired for fundraising purposes.

AUTHORITY: 26 U.S.C. 9034 and 9039(b)

SOURCE: 56 FR 34132, July 26, 1991 and 56 FR 35934, July 29, 1991, unless otherwise noted.

§ 9034.1 Candidate entitlements.

(a) A candidate who has been notified by the Commission under 11 CFR 9036.1 that he or she has successfully satisfied eligibility and certification requirements is entitled to receive payments under 26 U.S.C. 9037 and 11 CFR part 9037 in an amount equal to the amount of each matchable campaign contribution received by the candidate, except that a candidate who has become ineligible under 11 CFR 9033.5 may not receive further matching payments regardless of the date of deposit of the underlying contributions if he or she has no net outstanding campaign obligations as defined in 11 CFR 9034.5. See also 26 CFR parts 701 and 702 regarding payments by the Department of the Treasury.

(b) If on the date of ineligibility a candidate has net outstanding campaign obligations as defined under 11 CFR 9034.5, that candidate may continue to receive

matching payments for matchable contributions received and deposited on or before December 31 of the Presidential election year provided that on the date of payment there are remaining net outstanding campaign obligations, i.e., the sum of the the contributions received on or after the date of ineligibility plus matching funds received on or after the date of ineligibility is less than the candidate's net outstanding campaign obligations. This entitlement will be equal to the lesser of:

(1) The amount of contributions submitted for matching; or

(2) The remaining net outstanding campaign obligations.

(c) A candidate whose eligibility has been reestablished under 11 CFR 9033.8 or who after suspension of payments has met the conditions set forth at 11 CFR 9033.9(d) is entitled to receive payments for matchable contributions for which payments were not received during the ineligibility or suspension period.

(d) The total amount of payments to a candidate under this section shall not exceed 50% of the total expenditure limitation applicable under 11 CFR part 9035.

§ 9034.2 Matchable contributions.

(a) Contributions meeting the following requirements will be considered matchable campaign contributions.

(1) The contribution shall be a gift of money made: By an individual; by a written instrument and for the purpose of influencing the result of a primary election.

(2) Only a maximum of $250 of the aggregate amount contributed by an individual may be matched.

(3) Before a contribution may be submitted for matching, it must actually be received by the candidate or any of the candidate's authorized committees and deposited in a

designated campaign depository maintained by the candidate's authorized committee.

(4) The written instrument used in making the contribution must be dated, physically received and deposited by the candidate or authorized committee on or after January 1 of the year immediately preceding the calendar year of the Presidential election, but no later than December 31 following the matching payment period as defined under 11 CFR 9032.6. Donations received by an individual who is testing the waters pursuant to 11 CFR 100.7(b)(1) and 100.8(b)(1) may be matched when the individual becomes a candidate if such donations meet the requirements of this section.

(b) For purposes of this section, the term *written instrument* means a check written on a personal, escrow or trust account representing or containing the contributor's personal funds; a money order; or any similar negotiable instrument.

(c) The written instrument shall be: Payable on demand; and to the order of, or specifically endorsed without qualification to, the Presidential candidate, or his or her authorized committee. The written instrument shall contain: The full name and signature of the contributor(s); the amount and date of the contribution; and the mailing address of the contributor(s).

(1) In cases of a check drawn on a joint checking account, the contributor is considered to be the owner whose signature appears on the check.

(i) To be attributed equally to other joint tenants of the account, the check or other accompanying written document shall contain the signature(s) of the joint tenant(s). If a contribution on a joint account is to be attributed other than equally to the joint tenants, the check or other written documentation shall also indicate the amount to be attributed to each joint tenant.

(ii) In the case of a check for a contribution attributed to more than one person, where it is not apparent from the face of the check that each contributor is a joint tenant of the account, a written statement shall accompany the check stating that the contribution was made from each individual's personal funds in the amount so attributed and shall be signed by each contributor.

(iii) In the case of a contribution reattributed to a joint tenant of the account, the reattribution shall comply with the requirements of 11 CFR 110.1(k) and the documentation described in 11 CFR 110.1 (1), (3), (5) and (6) shall accompany the reattributed contribution.

(2) Contributions in the form of checks drawn on an escrow or trust account are matchable contributions, provided that:

(i) The contributor has equitable ownership of the account; and

(ii) The check is accompanied by a statement, signed by each contributor to whom all or a portion of the contribution is being attributed, together with the check number, amount and date of contribution. This statement shall specify that the contributor has equitable ownership of the account and the account represents the personal funds of the contributor.

(3) Contributions in the form of checks written on partnership accounts or accounts of unincorporated associations or businesses are matchable contributions, so long as:

(i) The check is accompanied by a statement, signed by each contributor to whom all or a portion of the contribution is being attributed, together with the check number, amount and date of contribution. This statement shall specify that the contribution is made with the contributor's personal funds and that the account on which the contri-

bution is drawn is not maintained or controlled by an incorporated entity; and

(ii) The aggregate amount of the contributions drawn on a partnership or unincorporated association or business does not exceed $1,000 to any one Presidential candidate seeking nomination.

(4) Contributions in the form of money orders, cashier's checks, or other similar negotiable instruments are matchable contributions, provided that:

(i) At the time it is initially submitted for matching, such instrument is signed by each contributor and is accompanied by a statement which specifies that the contribution was made in the form of a money order, cashier's check, traveler's check, or other similar negotiable instrument, with the contributor's personal funds;

(ii) Such statement identifies the date and amount of the contribution made by money order, cashier's check, traveler's check, or other similar negotiable instrument, the check or serial number, and the name of the issuer of the negotiable instrument; and

(iii) Such statement is signed by each contributor.

(5) Contributions in the form of the purchase price paid for the admission to any activity that primarily confers private benefits in the form of entertainment to the contributor (i.e., concerts, motion pictures) are matchable. The promotional material and tickets for the event shall clearly indicate that the ticket purchase price represents a contribution to the Presidential candidate.

(6) Contributions in the form of a purchase price paid for admission to an activity that is essentially political are matchable. An "essentially political" activity is one the principal purpose of which is political speech or discussion, such as the traditional political dinner or reception.

(7) Contributions received from a joint fundraising activity conducted in accordance with 11 CFR 9034.8 are

matchable, provided that such contributions are accompanied by a copy of the joint fundraising agreement when they are submitted for matching.

§ 9034.3 Non-matchable contributions.

A contribution to a candidate other than one which meets the requirements of 11 CFR 9034.2 is not matchable. Contributions which are not matchable include, for example:

(a) In-kind contributions of real or personal property;

(b) A subscription, loan, advance, or deposit of money, or anything of value;

(c) A contract, promise, or agreement, whether or not legally enforceable, such as a pledge card or credit card transaction, to make a contribution for any such purposes (but a gift of money by written instrument is not rendered unmatchable solely because the contribution was preceded by a promise or pledge);

(d) Funds from a corporation, labor organization, government contractor, political committee as defined in 11 CFR 100.5 or any group of persons other than those under 11 CFR 9034.2(c)(3);

(e) Contributions which are made or accepted in violation of 2 U.S.C. 441a, 441b, 441c, 441e, 441f, or 441g;

(f) Contributions in the form of a check drawn on the account of a committee, corporation, union or government contractor even though the funds represent personal funds earmarked by a contributing individual to a Presidential candidate;

(g) Contributions in the form of the purchase price paid for an item with significant intrinsic and enduring value, such as a watch;

(h) Contributions in the form of the purchase price paid for or other otherwise induced by a chance to partici-

pate in a raffle, lottery, or a similar drawing for valuable prizes;

(i) Contributions which are made by persons without the necessary donative intent to make a gift or made for any purpose other than to influence the result of a primary election;

(j) Contributions of currency of the United States or currency of any foreign country; and

(k) Contributions redesignated for a different election or redesignated for a legal and accounting compliance fund pursuant to 11 CFR 9003.3.

* * *

PART 9039—REVIEW AND INVESTIGATION AUTHORITY

Sec.

9039.1 Retention of books and records.
9039.2 Continuing review.
9039.3 Examination and audits; investigations.

AUTHORITY: 26 U.S.C. 9039.

SOURCE: 56 FR 35949, July 29, 1991, unless otherwise noted.

§ 9039.1 Retention of books and records.

The candidate and his or her authorized committee(s) shall keep all books, records and other information required under 11 CFR 9033.11, 9034.2 and part 9036 for a period of three years pursuant to 11 CFR 102.9(c) and shall furnish such books, records and information to the Commission on request.

§ 9039.2 Continuing review.

(a) In reviewing candidate submissions made under 11 CFR part 9036 and in otherwise carrying out its responsibilities under this subchapter, the Commission may routinely consider information from the following sources:

(1) Any and all materials and communications which the candidate and his or her authorized committee(s) submit or provide under 11 CFR part 9036 and in response to inquiries or requests of the Commission and its staff:

(2) Disclosure reports on file with the Commission; and

(3) Other publicly available documents.

(b) In carrying out the Commission's responsibilities under this subchapter, Commission staff may contact

representatives of the candidate and his or her authorized committee(s) to discuss questions and to request documentation concerning committee activities and any submission made under 11 CFR part 9036.

§ 9039.3 Examination and audits; investigations.

(a) *General.* (1) The Commission will consider information obtained in its continuing review under 11 CFR 9039.2 in making any certification, determination or finding under this subchapter. If the Commission decides by an affirmative vote of four of its members that additional information must be obtained in connection with any such certification, determination or finding, it will conduct a further inquiry. A decision to conduct an inquiry under this section may be based on information that is obtained under 11 CFR 9039.2, received by the Commission from outside sources, or otherwise ascertained by the Commission in carrying out its supervisory responsibilities under the Presidential Primary Matching Payment Account Act and the Federal Election Campaign Act.

(2) An inquiry conducted under this section may be used to obtain information relevant to candidate eligibility, matchability of contributions and repayments to the United States Treasury. Information obtained during such an inquiry may be used as the basis, or partial basis, for the Commission certifications, determinations and findings under 11 CFR parts 9033, 9034, 9036 and 9038. Information thus obtained may also be the basis of, or be considered in connection with, an investigation under 2 U.S.C. 437g and 11 CFR part 111.

(3) Before conducting an inquiry under this section, the Commission will attempt to obtain relevant information under the continuing review provisions of 11 CFR 9039.2. Matching payments will not be withheld pending

the results of an inquiry under this section unless the Commission finds patent irregularities suggesting the possibility of fraud in materials submitted by, or in the activities of, the candidate or his or her authorized committee(s).

(b) *Procedures.* (1) The Commission will notify the candidate of its decision to conduct an inquiry under this section. The notice will summarize the legal and factual basis for the Commission's decision.

(2) The Commission's inquiry may include, but is not limited to, the following:

(i) A field audit of the candidate's books and records;

(ii) Field interviews of agents and representatives of the candidate and his or her authorized committee(s);

(iii) Verification of reported contributions by contacting reported vendors;

(v) Written questions under order;

(vi) Production of documents under subpoena;

(vii) Depositions.

(3) The provisions of 2 U.S.C. 437g and 11 CFR part 111 will not apply to inquiries conducted under this section except that the provisions of 11 CFR 111.12 through 111.15 shall apply to any orders or subpoenas issued by the Commission.

[56 FR 35949, July 29, 1991; 56 FR 42380, Aug. 27, 1991]

APPENDIX E

FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED, 2 U.S.C. § 431-455 (excerpts)

§ 437c. Federal Election Commission

(a) *Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman.*

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2) (A) Members of the Commission shall serve for terms of 6 years, except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be af-

filiated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.*

(1) The Commission shall administer, seek to obtain compliance with and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) *Voting requirements; delegation of authorities.* All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.

* * *

§ 437d. Powers of the Commission

(a) *Specific authorities.* The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code,

as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

* * *

(e) *Exclusive civil remedy for enforcement.* Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

§ 437f. Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures applicable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law

which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any requests made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

§ 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged viola-

tion, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A concilia-

tion agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not ex-

ceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occured or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95

or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) *Repealed.*

(11) If the Commission determines after an investigation that any person has violated an order of

the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent viola-

tion to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, and 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or

chapter 96 of this title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether–

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

§ 438. Administrative provisions

(a) *Duties of Commission.* The Commission shall–

(1) prescribe forms necessary to implement this Act;

(2) prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting;

(3) develop a filing, coding, and cross-indexing system consistent with the purposes of this Act.

(4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record;

(5) keep such designations, reports, and statements for a period of 10 years from the date of receipt, except that designations, reports, and statements that relate solely to candidates for the House of Representatives shall be kept for 5 years from the date of their receipt;

(6) (A) compile and maintain a cumulative index of designations, reports, and statements filed under this Act, which index shall be published at regular intervals and made available for purchase directly or by mail;

(B) compile, maintain, and revise a separate cumulative index of reports and statements filed by multicandidate committees, including in such index a list of multicandidate committees; and

(C) compile and maintain a list of multicandidate committees, which shall be revised and made available monthly;

(7) prepare and publish periodically lists of authorized committees which fail to file reports as required by this Act;

(8) prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d) of this section;

(9) transmit to the President and to each House of the Congress no later than June 1 of each year, a report which states in detail the activities of the Commission in carrying out its duties under this Act, and any recommendations for any legislative or other action the Commission considers appropriate; and

(10) serve as a national clearinghouse for the compilation of information and review of procedures with respect to the administration of Federal elections. The Commission may enter into contracts for the purpose of conducting studies under this paragraph. Reports or studies made under this paragraph shall be available to the public upon the payment of the cost thereof, except that copies shall be made available without cost, upon request, to agencies and branches of the Federal Government.

(b) *Audits and field investigations.* The Commission may conduct audits and field investigations of any political committee required to file a report under section 434 of this title. All audits and field investigations concerning the verification for, and receipt and use of, any payments received by a candidate or committee under chapter 95 or chapter 96 of title 26 shall be given priority. Prior to conducting any audit under this subsection, the Commission shall perform an internal review of reports

filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. Such thresholds for compliance shall be established by the Commission. The Commission may, upon an affirmative vote of 4 of its members, conduct an audit and field investigation of any committee which does meet the threshold requirements established by the Commission. Such audit shall be commenced within 30 days of such vote, except that any audit of an authorized committee of a candidate, under the provisions of this subsection, shall be commenced within 6 months of the election for which such committee is authorized.

* * *

(d) *Rules, regulations, or forms; issuance, procedures applicable, etc.*

(1) Before prescribing any rule, regulation, or form under this section or any other provision of this Act, the Commission shall transmit a statement with respect to such rule, regulation, or form to the Senate and the House of Representatives, in accordance with this subsection. Such statement shall set forth the proposed rule, regulation, or form, and shall contain a detailed explanation and justification of it.

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No. 93-519

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

LYNDON H. LAROUCHE AND DEMOCRATS FOR ECONOMIC RECOVERY-LAROUCHE IN '92,
Respondents.

BRIEF IN OPPOSITION AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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October 29, 1993

32 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the provisions of the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042, permit the Federal Election Commission to inquire into the *bona fides* of a candidate's promises made in a candidate's eligibility agreement executed under the statutory provisions of 26 U.S.C. § 9033(a).

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Federal Election Commission, *1990 Annual Report* 18, 20

Respondents, Lyndon H. LaRouche and Democrats for Economic Recovery-LaRouche in 92 ("LaRouche" and "the Committee") respectfully submit this brief in opposition to the petition of the Federal Election Commission ("FEC" or "Commission") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Lyndon H. LaRouche and Democrats for Economic Recovery-LaRouche in 92 v. Federal Election Commission*, 996 F.2d 1263 (D.C. Cir. 1993).

Respondents accept Petitioner's identification of the Opinion Below, statement of Jurisdiction, and citation of the relevant statutes and regulations, with the notable exception that Petitioner has failed to include the most important reference to the First and Fifth Amendments to the Constitution of the United States.

MISSTATEMENTS OF THE CASE

In accordance with Supreme Court Rule 15.1 Respondents address all perceived misstatements of fact and law in the Commission's petition ("Pet."). The unadjudicated allegations of its Subsections C and D (Pet. 6-11), and its representation of the appeals court's decision at 13-16, are neither relevant nor accurate. See below, Respondent's Brief Subsections B and C, at 3-12. It is also to be noted, that eight pages of Petitioner's Statement of the Case have nothing to do with the "sole issue" addressed by the court below, but are instead a recitation of facts previously alleged by Petitioner, but deemed irrelevant by that court. Petitioner does not argue that the court erred by not taking up this recitation. Indeed, Petitioner attempts to induce this Court to believe the unsupported inference that the appeals court acquiesced to those alleged facts (see Subsection A, below).

A. Petitioner Misrepresents the Court Below

1. The Court Did Not Adopt Petitioner's Statements of Facts

Petitioner attempts to convey a misimpression that the court below made a finding of fact with regard to the FEC's allegations of LaRouche wrongdoing, asserting that "[t]he court of appeals did not question the facts upon which the Commission relied" (Pet. 16). On the contrary, the court determined that Petitioner's case did not rise to the threshold at which such facts needed to be tried. The court, therefore, "did not question the facts" not because it considered them to be true, but because even if true they were irrelevant to the "sole issue" before it, such that even when "assumed" to be valid "for purposes of this case," they added nothing to Petitioner's legal argument (Petitioner's Appendix ["Pet App."] 4a). As the court clearly set forth,

> [t]he sole issue before us is whether the Matching Payment Act permits the Commission to withhold matching funds on the basis of its assessment of evidence leading it to distrust the agreements and commitments made by an applicant under §§ 9033(a) & (b).

Pet. App. 6a.

The alleged facts set forth in Petitioner's Subsections C and D, therefore, do not constitute any portion of the appeals court decision for which Petitioner seeks a writ, and should be ignored by this Court.

2. Petitioner Misrepresents Both Majority and Minority Opinions

Petitioner not only represents as "facts" in the case, its own allegations never tried by the court below, but goes on to misrepresent the court's opinion, substituting the words of Judge Wald's partial dissent for those of the majority, while simultaneously misstating the Judge's own representation of the majority (Pet. 15). What Judge Wald actually said of the majority at the cited section was,

> the majority accepts the Commission's determination that the candidate whose agreements contain impermissible qualifications has not "established" his eligibility,

which is not and never was at issue in this case. She did not here state, as Petitioner alleges, "that the majority had agreed that the Commission could reject formally correct candidate promises...." Petitioner therefore necessarily omits Judge Wald's qualifying and subordinating "I believe" in representing the immediately ensuing quotation, thus portraying the passage as if it were not simply her dissenting opinion, but that of the majority as well. Pet. App. 15a. It goes without saying that Petitioner should not misrepresent the decision of the court below; still less should Petitioner suggests it was the court minority, not itself, who made the misrepresentation.

B. Petitioner Misrepresents the History of LaRouche's Campaign Financing Activity

1. Overview

Petitioner further seeks to mislead this Court by the emotion-laden terms in which its alleged facts are cloaked.

Subsections C and D reflect the long and stormy relationship Petitioner's Office of General Counsel has had with Respondent LaRouche, as is evidenced by the repeated use of the terms "fraud," "repudiated promise," and "irregularity," lacking the legal precision to be expected from a General Counsel for such an important agency. It is **flatly wrong** that LaRouche "either repudiated his promises or engaged in other fraudulent behavior to obtain matching funds" (Pet. 6) -- even were that to be relevant. The recital of each campaign, starting in 1976 -- when no public funds were granted -- through the most recent events, makes it appear that the usual errors and mistakes common in **all** presidential campaigns have become in the eyes of Counsel -- only in Mr. LaRouche's case -- a matter of "fraud."

The General Counsel further makes the **right** of a candidate to question rulings of the Commission in court -- in Mr. LaRouche's case -- a matter of "repudiation of promises," while other candidates including Presidents Carter, Reagan, and Bush, and Senators Kennedy, Mondale, and Glenn can challenge the Commission without incurring such a stigma. Most recently Pat Robertson and Senator Robert Dole have also questioned the audit reports of Petitioner in the same manner as Mr. LaRouche. All of the above candidates, in order to obtain federal funds, have signed the same or similar letters to that executed by Respondent; yet their challenges to Commission determinations have not been condemned as "repudiation of their promises." Nor have those similar errors been delineated as "fraud." It is further apparent that the General Counsel ignores the First Amendment to the Constitution, where "right to petition," includes access to the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

Counsel for Petitioner equates the statutory obligation of a candidate to repay matching funds (see 26 U.S.C. §§

9036-9038, Pet. 5) with the obligation of his committee to pay a fine negotiated by the committee. Such an interpretation just isn't justified by the Congressional history nor the plain language of the statute.

The Commission obviously has been upset that Mr. LaRouche and his various committees in four elections have challenged some of its rulings and investigations. While both sides to these quarrels may be charged with exaggeration and excessive rhetoric, such lawsuits and varying legal positions must be viewed in the context of a new law (first effective in 1976), an inexperienced Commission and staff, and a candidate whom the petitioner did not consider "mainstream" in the political spectrum. Even so, candidate LaRouche's record of compliance with the Act differs in no respect unfavorably from that of nearly every other candidate who has received presidential primary matching funds. The facts of Mr. LaRouche's four earlier presidential campaigns ought therefore to speak for themselves, unencumbered by invidious and subjective rhetoric.[1] Specifically:

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[1] The FEC itself bears a responsibility for igniting fires of controversy and suspicion where nothing but routine, technical, and universal campaign problems or errors previously existed. As Judge Brieant first noted this process in *Dolbeare v. FEC*,

> [i]t would be hard to imagine a more abusive visitation of bureaucratic power, than has already been imposed upon this [...] group,

and:

> We doubt that the Congressional sponsors [of FECA and Matching Payment Account Act] ever expected or intended that a volunteer political group would become so enmeshed in governmental red tape and bureaucratic nitpicking, as to be visited with as many MUR's ["Matters Under Review"] and separate investigations as have been visited upon these plaintiffs, without prompt conclusion.

Memorandum and Order, *Dolbeare et al. v. Federal Election Commission*, 81 Civ. 4468-CLB (S.D.N.Y. April 15, 1982), at 38-39. See Joint Appendix Court of Appeals at 99-100.

2. Facts of the 1976 Campaign

LaRouche did not receive matching funds in the 1976 election. Though the Commission pursued a six-year investigation, no allegations of campaign law violations arising from that campaign were ever brought to court. All allegations were officially closed with a conciliation agreement in November 1982, that recited events arising solely from the 1980 campaign.[2] As to the court opinions cited in the petition, *e.g.*, *Committee to Elect LaRouche v.*

Despite the rebuke, the FEC has continued to devote substantial resources to inconclusive investigations of LaRouche's campaigns and efforts to bar his access to campaign funding (see factual recitation below). At the same time, it dropped its case against a political opponent of Mr. LaRouche's, when despite undisputed findings by the FEC that the Anti-Defamation League had made illegal expenditures in opposition to a LaRouche candidacy, it deemed the ADL's "sympathetic posture" sufficient reason not to bring these violations to court. Similarly, over the vehement opposition of two Commissioners, the FEC aborted its investigation of the 1984 Mondale campaign, concerning potentially millions of dollars in violations, on the grounds that the investigation might be too large. Precisely because of the harm that subjective judgments can wreak in the sensitive First Amendment area, both Congress and the courts have insisted on objective criteria for Commission functioning, notwithstanding the deference doctrine.

[2] The statute provides that "a conciliation agreement, unless violated, is a **complete bar** to **any further action** by the Commission," 2 U.S.C. § 437g(4)(A)(i) (emphasis added). This has not stopped the FEC from alleging, every time Mr. LaRouche has subsequently applied for matching funds, that his campaigns committed "fraud" in 1976. The Conciliation Agreement itself, as executed by the Commission, reaffirms this statutory mandate of closure: "It is the understanding of the Respondent and the Commission that the execution of this agreement will result in the termination of all pending Matters Under Review concerning the respondent as of the present date, and that this agreement **constitutes complete satisfaction of all such pending Matters Under Review**" (emphasis added) See, Supplementary Attachment, LaRouche Reply Brief in Court of Appeals

Federal Election Commission, these merely upheld the Commission's right to conduct an investigation of the campaign's matching funds qualifying ("threshold") submission based on the appearances of that submission. No finding was made that any "fraud" or other misrepresentation had in fact occurred. Since there were no matching funds, no agreement existed that could be "repudiated."

3. Facts of the 1980 Campaign

Though the Commission conducted an extensive investigation of this campaign as well, all allegations and suppositions were abandoned in the conciliation agreement that closed the case, except a total of $26,227.64 in conciliated infractions. Of this, $22,103.48 concerned excessive contributions from a number of individuals -- a level of this type of violation **far** less than that of most other publicly funded presidential candidates in that or any other election. The "knowing and willful" instance that Petitioner repeatedly cites, contained in this same conciliation agreement, amounts to $4,664.58, out of a total in contributions raised of $1,450,000 and contributions matched of $526,000. This violation moreover is attributed solely to the campaign committee ("through its volunteers")[3], not even

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[3] It is noteworthy that Mr. LaRouche's campaigns, from 1976 through 1992, have always been staffed by nonprofessional volunteers, who though seeking advice of qualified legal and accounting professionals, have never had the background or resources characteristic of the larger, more "mainstream" candidates. On this basis, nonetheless, as Counsel for the Commission noted in his brief in the Court below, the LaRouche campaign in 1992 raised well over $1 million. Over 7,000 individual donations made up these funds. Noticeably absent have been contributions from corporate or labor organization political action committees ("PACs"), or so-called "bundled" or "soft money" contributions from close circles of corporate or partnership executives.

to the committee's treasurer, as is customary, still less to Mr. LaRouche himself, notwithstanding Petitioner's attempt to imply that even this minuscule violation can be laid at his personal doorstep.

Respondent does not challenge Petitioner's claim that presidential primary candidates are obliged under the Act to take personal responsibility for complying with the provisions of the Act. This reasonable and statutorily mandated responsibility does not extend, however, to a candidate's being personally charged with infractions committed, or thought to have been committed, by his campaign committee or its officers, employees, or volunteers. Petitioner, to the contrary, seeks to expand the statute by subtle rhetorical devices, in the case of Mr. LaRouche and no other candidate. See, *e.g.*, the patently false claim that "matching payments are paid **directly** to the candidate" (Pet. 5, emphasis added), as if the entire mechanism of campaign **committees**, and treasurers as their accountable officials, had been wiped from the statutes. See 26 U.S.C. § 9036.[4]

The 1982 conciliation agreement and associated $15,000 civil penalty, and the circumstances surrounding it, constitute the single event that General Counsel brandishes to create an aura of fifteen years' worth of "campaign law abuse." Such use of the conciliation agreement also flies in the face of the clear congressional mandate that "a conciliation agreement ... is a **complete bar** to **any further action** by the Commission" (see Note 2 above).

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[4] The FEC is hardly likely to charge Senator Paul Tsongas, for example, with "personal" responsibility for the unauthorized use of public funds committed when his treasurer embezzled committee funds in an amount reported to exceed $1 million. FEC *Record* October 1993.

4. Facts of the 1984 Campaign

Petitioner argues that the time elapsed between its Final Repayment Determination, and the 1980 campaign committee's repayment, constitute evidence of a lack of "intention to fulfill" the promises of the candidate letter. Throughout this time, Petitioner was aware that the campaign committee (a) did not possess the funds to make such payment (as revealed in its regular financial disclosure reports), and (b) was actively contesting that determination in Court, as nearly every single candidate faced with repayment determinations has done, throughout the history of the Matching Payment Account Act.

Then, to attempt to give weight to a preposterous assertion, Petitioner cites the Fourth Circuit case on ballot access and the *Spannaus* case in New York where the courts merely in passing *dicta* commented on the actions of the FEC. After making a large "cloud of smoke" over the nonpayment issue -- we find the repayments were, in fact, made!

Petitioner then continues its litany -- Petitioner's own term -- charging Respondent, in the 1984 campaign, with $35,000 worth of unauthorized withdrawals from contributor credit card accounts. This is a case in point of Petitioner's recitation of unsubstantiated allegations as if they were not only fact, but facts at issue in the case. First, to this day, this alleged fraud has consistently failed of proof, though it was extensively tried through documents and witnesses in *United States v. The LaRouche Campaign, et al.*, 695 F.Supp. 1317 (D. Mass. 1988), in which the FEC supplied the prosecution with all of the Commission's own extensive investigative material on this subject. After the case ended in a mistrial, the government dropped all the charges. Petitioner, however, contrary to bedrock principles of the U.S. Constitution and American legal doctrine, continues to cite this now

meaningless piece of paper -- an abandoned indictment -- as if it were a conviction and its contents a fact.

Secondly, even if the alleged unauthorized credit card charges had been proved, it would have had nothing to do with the Matching Payment Account Act. The campaign committee made no attempt to submit any of the contributions in question to be matched by federal funds.[5] Further, the record in the *Spannaus* case cited on p. 9 of the petition indicates that the extent of even the alleged "unauthorized charges" was 1% of the loan sample or 2% of the contributions sample (641 F.Supp. 1520 at 1529) -- again, hardly evidence of a fraudulent scheme. Thus, as with the 1976 and 1980 campaigns, Petitioner's allegation of "repudiated promises" or "fraudulent behavior to obtain matching funds" is empty.

5. Facts of the 1988 Campaign

In 1988 Mr. LaRouche filed for matching funds (Pet 9-10), only to again meet the opposition of the General Counsel. Respondents convinced the Commission to seek written confirmation from the 1000 contributors Counsel had challenged, and after the Audit Division deemed only 43 questionable, the matching funds were approved. As we have observed, since Mr. LaRouche is neither considered "mainstream" by the FEC, nor an incumbent, certain contributors when faced with an official query may well decline to admit to a prior valid contribution. Under such scrutiny the wonder is that the questionnaire return rate was over 70% -- comfortably high by all accepted standards of

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[5] Credit card contributions are ineligible for matching funds by law.

polling and statistical reliability -- and still more remarkable, that the FEC could only find 43 **it** rated questionable. As Chief Justice Burger noted in his concurring opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), even simple disclosure provisions may deter some individuals who might otherwise contribute and may "think twice" before making even modest contributions to a candidate, at 424 U.S. 237. Again the unwarranted label of "false contribution" is attached even though the FEC has never given Respondents the required notice of the factual basis of the claim, see 437g(A)(2).[6] The claim should be stricken from this petition. The 1988 campaign thus joins the previous three: no "repudiated promises," no "fraud."

6. Conclusion

Commission Counsel's attempt to distinguish Mr. LaRouche's campaigns from those of other presidential primary candidates continues to omit the relevant facts, that (a) the following campaigns were obliged to conciliate campaign law violations in **every presidential primary campaign** in which the candidates participated: Reagan (1976, 1980, 1984); Carter (1976, 1980); and Bush (1980, 1988); and (b) the range of dollar-value of campaign financing violations charged to candidates **other than** LaRouche have ranged from a few tens of thousands of dollars, to **over one million dollars.**

Nor can Mr. LaRouche's campaigns be distinguished as to class of violation. Those conciliated or adjudicated with other candidates include massive abuse of campaign spending

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[6] Although often requested, the FEC has refused to disclose the names of the 43 persons allegedly responding negatively to the mail survey questionnaire, or any unredacted response texts.

limits, acceptance of excessive contributions from individuals, illegal corporate or union contributions, failure or refusal to provide records of campaign depositories to FEC auditors, and attempts to evade campaign spending limits by the creation of "delegate committees" falsely alleged to be "independent." In fact as time has passed since the beginning of public funding, such violations by other candidates have not lessened with experience, but have grown spectacularly. None of these candidates has been charged by the FEC with "repudiating their promises" not to violate campaign finance laws. See, Respondent's Reply to FEC determination, Joint Appendix at 072-075 (also reprinted the Appendix I to this Brief), for a systematic comparison of LaRouche's campaigns with those of all other publicly funded presidential primary candidates from 1976 through 1988.

C. The Court Below Was Unanimous in Repudiating Petitioner's Reliance on and Representation of an Irrelevant Court Decision

Subsection D of Petitioner's petition (Pet. 10-11) should be ignored by this Court. As all three of the Judges below agree, the "only arguably related convictions" (Pet. App. 18a) should not have been any part of the Commission's eligibility determination. Indeed Judge Wald, on whose partial dissent Petitioner relies otherwise, points out in this regard,

> When the Commission **concocts** a theory of liability that relies on the court's denial of the defense motion to instruct the jury on the exclusion of the fundraising practices of political committees, it has strayed not only beyond its area of recognized expertise, but beyond the "circumscribed" inquiry into "patent irregularities" permissible during the certification process (citations omitted, emphasis added).

Pet. App. 14a Note 1.

D. Petitioner Fails to Acknowledge the Relevance of the First Amendment to the United States Constitution

The short shrift Petitioner affords to the First Amendment to the U.S. Constitution well captures the degree of difference between its own view of its authority, and that asserted by Respondent and upheld by the court below. As the Chief Justice (Rehnquist) observed in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 at 493 (1985), "there can be no doubt that the [Presidential campaign] expenditures at issue in this case produce speech at the core of the First Amendment."

Mr. LaRouche continues to assert positions in the political debate that irritate and stimulate response. The protection, still more, the encouragement, of that behavior is precisely the purpose of the First Amendment and the Matching Payment Account Act: to add to the robust and uninhibited discussion of issues. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).[7] In all campaigns, Mr. LaRouche has offered new approaches to economic problems still facing

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[7] When Mr. LaRouche discussed the drug problem in 1976 and 1980 he identified a problem that "mainstream" politicians did not address until years later. When Mr. LaRouche discussed AIDS and the imminence of epidemics of other diseases, both known and unknown, as well as nuclear energy policies, in 1980 and 1984 he was in advance again. In the 1980 presidential campaign he put forward the missile defense proposals based on "new physical principles" that were subsequently adopted by President Reagan under the title of "Strategic Defense Initiative." In 1988 he discussed the possibility of an imminent reunification of Germany and its implications for strategic and foreign policy, long before the fall of the Berlin Wall, stressing as well the likelihood of major upheavals in the (then) Soviet Union if the U.S. and the West did not adopt a policy of economic and technological cooperation with that part of the world, upheavals that are now reaching ever-greater dimensions.

our present leaders. Though his discussion of all the issues enumerated in Note 7 (above) have been derided by many, no one can doubt that these views help stimulate the thinking of the voting public. But these views have also have won the enmity of this federal agency, the members of which are selected for participation in the "usual and normal" political activities, and whose numbers are carefully apportioned between the mainstreams of the two ruling political parties. This may well have led, however inadvertently, to a "tunnel vision" that can amount to a partisan abuse of office. Coupled with a General Counsel's office that has shown little regard for the First Amendment (in fact in this case he suggested that *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) eliminated the First Amendment from the interpretation of election matters), it is little wonder that Respondents have fared so badly through the years.

While the court below did not decide the case directly on the Constitutional issue, it noted that First Amendment concerns set forth in previous cases (*Committee to Elect LaRouche v. Federal Election Commission*, 613 F.2d 834, D.C. Cir. 1979, and *In re Carter-Mondale Reelection Committee*, Inc. 642 F.2d 538, D.C. Cir. 1980) were definitely **not** eliminated by *Regan* (Pet. App. 12a), and rejected Petitioner's claim that First Amendment considerations were irrelevant to the public funding process.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has simply converted the petition for a writ of certiorari, which is to be addressed to the reasons why this Court should even hear the case, into an argument on the merits of why the Court below was wrong. In an abortive attempt to "bootstrap" themselves into this Court, they assert a "conflict among the circuits" in the pure *dicta* of the Fourth Circuit in its ballot access case of *LaRouche v. State Board of Elections*, 758 F.2d 998 (4th Cir. 1985) and the *Spannaus* case in New York (Pet. 17).

Rule 10.1 of this Court points out that review by writ of certiorari is not a matter of right, but of judicial discretion. The rule requires "special and important reasons" for approval, and though not controlling, one of the reasons for granting the writ is a conflict between decisions of various courts of appeal **on the same matter**, Rule 10.1(a). Petitioner in a brazen bit of obfuscation to satisfy the Rule's requirement, asserts, "The decision of the majority below conflicts with the **views** of two other courts," Pet. 17 (emphasis added). The first alleged "conflict" is the 4th Circuit decision in *LaRouche v. State Board of Elections*, 758 F.2d 998 (4th Cir. 1985). Not only is that case inapposite but it is even factually wrong. In 1984, after initially denying funding to Mr. LaRouche -- long enough to deny him ballot access in North Carolina and some other states -- the FEC did, in fact grant matching funding under the Act. Therefore there is no conflict between the Circuits in the ruling for which the Commission seeks certiorari.

The second case cited by Petitioner is even more wide of the mark. *Spannaus v. Federal Election Commission*, 641 F.Supp. 1520 (S.D.N.Y. 1986) was an attempt to curtail what plaintiffs charged were bad faith investigations by the Commission into individual contributors to the 1980

campaign. As the District Court notes in his opinion, the LaRouche Campaign was eligible to receive matching funds on April 12, 1984, at 1524. Since the Court was in no way faced with the issues before the court below, its gratuitous remark that the "Commission's decision appears to be legally sound" (at 1526) is not in conflict with the opinion at bar.

It is further well settled that this Court does not sit as a court of error over the federal courts of appeals. Certainly Petitioner cannot claim that the court below "departed from the accepted and usual course of judicial proceedings" requiring this Court's power of supervision. The opinion of the court of appeals follows usual and standard methods of statutory construction. The opinion gives deference to previous cases and even "**assumes**" for the purposes of the case "the Commission's findings of past misconduct" (Pet. App. 4a). It need hardly be said, Respondents emphatically disagree with the Commission's views and the Court's assumption. But given all the benefit of the doubt, the Court held that the statute just does not empower the Commission to do what the General Counsel has advised.

In fact, in the transcript of the meeting at which the Commission denied the 1992 matching funding (Court of Appeals Joint Appendix, p. 171 *et seq.*) the various Commissioners expressed comments such as:

- "I think if the committee came back at the next stage and could demonstrate the legality of these contributions, I would be hard pressed not to, to grant them that money";

- "...he was not criminally convicted of violations of Title 26, ... I don't believe his campaign was guilty of anything";

- "these past bad acts are the whole argument, since the 1992 candidate agreement is error-free on its face, and the 1992 threshold submission seems error-free on its face";

- "...if we're going to take the position that anybody who has gone through the process and has had those kinds of violations is going to be deemed by us ineligible, I don't think it's going to fly, and it would, we might have to reconsider some eligibility determinations we've already made this time around."

Even the General Counsel opened his remarks at that meeting by saying, "... it is my understanding that based on the Audit Division's review, that on its face the submission looks adequate." Certainly with even the Commission's reluctance to follow the General Counsel in the record, the Petitioner cannot claim that the Court below needs judicial supervision. As this Court said in *Rice v. Sioux City Memorial Cemetery, Inc.* 349 U.S. 70 at 74, 75 Sup.Ct. 614,

> a federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants (citations omitted).

Petitioner also exaggerates the opinion of the court below, in claiming that the court:

> ruled instead that the statute requires the Commission to certify for public financing **any** candidate satisfying the other eligibility criteria who submits the prescribed promises written in the proper form -- no matter how lengthy, consistent, and purposeful the candidate's

> record of repudiating the same promises in past election campaigns.

Pet. 16.

A reading of the opinion will disclose the inaccuracy of Petitioner's accusation.

Respondents suggest that if the FEC wishes to make changes in the law to justify its actions here it should be addressed to Congress. Indeed the Commission did just that in the past several times, and though Congress has accepted some requested amendments to the Act and approved a great many new and modified regulations, it has regularly ignored the request that the Commission be authorized to deny funding based on "past actions." In the *1990 Annual Report* to Congress and the President, the Commission argued that there was a "need to ensure that candidates who have wilfully violated laws relating to the public funding process will not be eligible for [future] public funding." The report continues:

> With regard to the candidate's past experience with the public funding process, **neither** of the Presidential public financing statutes places any limitation on eligibility for funding based upon a candidate's prior violations of law, **no matter how severe.... For example, if a candidate has been convicted of fraud** with respect to raising funds for a campaign that was publicly financed, the Commission should not be required to certify funds for future campaigns (emphasis added).

Federal Election Commission, *1990 Annual Report* at 38; see also *Annual Report* for 1989, 1991, 1992.

This construction of the statute was made by the same General Counsel that now seeks certiorari based upon

Commission actions 180 degrees at odds to that conclusion. His remedy should not be found here.

Respondents further believe that review of this case is unnecessary because its precedential impact is minimal.[8] The constitutional issues were subordinated to the statutory interpretation, and as already mentioned previously on page 18, the Petitioner has in the past at least four times sought Congressional action to give them the power they took in the case at bar (without avail).

Counsel for Petitioner further attempts to confuse the issue as set forth by the court below in his argument concerning interpretation of *Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) (Pet. 18), suggesting that the court below failed to afford sufficient judicial deference to the agency. As this Court said in *Chevron*, however,

> First, always, is the question whether Congress has directly spoken on the precise question at issue. If the intent of Congress is clear, that is the end of the matter.

The Court of Appeals clearly examined the statutes and Congressional intent and determined, based on the clarity of the statute (Pet. App. 13a), that

> ... the Commission is not authorized to appraise candidates' good faith, honesty, probity or general

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[8] General Counsel seems to challenge the Circuit Court's decision only in application to this case, in effect challenging the **factual** situation and not legal conclusions of the Court. Rule 10 does not envision the Supreme Court's duty to review factual situations.

> reliability when reviewing the agreements and other forward-looking commitments required by [§] 9033(a) & (b).

As to Petitioner's argument that the court below "acknowledged" that deference is due to the Commission's construction of its regulation 11 C.F.R. § 9033.4(b) (Pet. 18), in fact the court all but voided the regulation (Pet. App. 6a):

> We may dispose at the outset of the Commission's reliance on one of its regulations, 11 C.F.R. § 9033.4(b)....

because, *inter alia*,

> the regulation does not even purport to answer the question before us. It permits the Commission to consider information that is "relevant to a determination regarding the candidate's eligibility", but doesn't attempt to define what subjects are relevant. Even if it did, the regulation would of course be valid only to the extent that it conformed to the statute.

Petitioner proffers as a final reason why a writ should issue, that "the decision below is likely ... to undermine the success of this important program" (public funding of presidential campaigns) because the decision "can only diminish public confidence in the integrity of the program." Pet. 24-25. This is a political argument, not a legal one, reflecting an improper motivation that this Court should not legitimize. It is for the Congress, not the Commission or a Court, to consider the impact of its legislation on public opinion. Indeed, the Commission has submitted this same argument to Congress in every Annual Report from 1989 through 1992; and, as noted above, Congress has repeatedly

refused to grant the FEC that authority which the agency has nonetheless arrogated to itself in this case.

CONCLUSION

The statutes and cases do not grant the Federal Election Commission authority to deny eligibility for primary matching funds if the statutory requirements are met. No construction of the laws can produce such an interpretation. Petitioner has repeatedly asked Congress for the authority it seeks to uphold here and Congress has refused. Prompt and even-handed funding to all candidates based upon specific criteria spelled out by Congress is required in this field because of First Amendment considerations inherent in public campaign financing. Petitioner's exaggeration and misrepresentation of fact should not be countenanced and General Counsel should be admonished.

Further, the writ should be denied for failure to meet the requirements of Rule 10 of the Rules of the Supreme Court of the United States. For these and other reasons stated above the Federal Election Commission's petition for a writ of *certiorari* should be denied.

Respectfully submitted,

—James F. Schoener, Esq.
Richard Mayberry, Esq.

Attorneys for Respondents

APPENDIX

Table 1.

Publicly-Funded Candidates: Campaign Violations on the Public Record

This table identifies presidential candidates receiving public funding, showing for each the number of MURs that resulted in findings of campaign law violations. Only those MURs are shown that were resolved by conciliation or court finding; those that were closed without conciliation or penalty are excluded, as are those that may still be open and hence not disclosed to the public.

Only primary election campaigns are shown; general election campaigns would add further MURs (e.g., an additional MUR for each of the two Reagan-Bush general campaigns).

Candidates are listed alphabetically starting with the 1976 campaign. Those that ran in more than one election cycle are carried forward on the same line. When candidates appear for the first time, they are listed alphabetically under the year in which they first campaign. Note that the "Jackson" running in 1976 is the late Sen. Henry Jackson, not Jesse Jackson.

Table 1 (cont'd)

Candidates per election, with number of conciliations

1976	1980	1984	1988
Bayh			
Bentsen			
Brown[1]	Brown		
Carter[1]	Carter[1]		
Church[1]			
Ford[1]			
Harris[1]			
H.Jackson			
LaRouche[1]	LaRouche[1]	LaRouche	LaRouche
McCormack[1]			
Reagan[1]	Reagan[2]	Reagan[1]	
Sanford			
Shapp[1]			
Shriver			
Udall[1]			
Wallace[1]			
	Anderson[1]		
	Baker		
	Bush[1]		Bush[1]
	Crane[1]		
	Dole[1]		Dole[1]
	Kennedy[1]		
		Askew[1]	
		Cranston[2]	
		Glenn[1]	
		Hart[1]	Hart

Table 1 (cont'd)

1976	1980	1984	1988
		Hollings[1]	
		Jackson[2]	Jackson[1]
		McGovern[1]	
		Mondale[2]	
			Babbitt[1]
			Biden
			Dukakis
			DuPont[3]
			Gephardt
			Gore
			Haig[1]
			Kemp[1]
			Robertson
			Simon

Table 2. Expenditures in Excess of State Limits ($)

		1976	1980	1984	1988
Carter	IA		45,514		
	ME		28,07		
	NH		24,704		
Cranston	NH			106,924 (13%)	
Dole[3]	IA				306,730 (40%)
	NH				302,949 (66%)
Dukakis[3]	IA				281,001 (36%)
	NH				58,835 (13%)
DuPont	IA				85,842 (11%)
Gephardt[3]	IA				495,718 (64%)
Glenn[2]	IA			149,421 (22%)	
	NH			218,881 (54%)	
Kemp[3]	IA				114,680 (15%)
	NH				73,920 (16%)
Kennedy[1]	IA		13,562		
	NH		4,972		
LaRouche	NH		36,586		58,936 (13%)
Mondale	IA			147,364 (22%)	
	NH			128,333 (32%)	
	ME			25,283 (6%)	
	Overall			578,904	

		1976	1980	1984	1988
Reagan	NH	30,285			
[1]	NH		18,830		
Simon[3]	IA				909,962 (117%)
	NH				224,850 (49%)
Udall	NH	9,694			

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1 Reduced to this amount by litigation.

2 Per MUR 2072. This case was also litigated, prior to reaching conciliation.

3 Per Final Audit Report or *FEC Record* citation of Final Audit Report